

NOTES

INTERSTATE IMMORALITY: THE MANN ACT AND THE SUPREME COURT*

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment."

Marshall, C. J., *United States v. Willberger*.¹

Broad judicial interpretation of the Mann Act ² is a venerable example of the results of failure to reconcile underlying legislative intent with the language of a penal law.³ In construing the prohibition on the transportation of women in foreign and interstate commerce "for the purpose of prostitution or debauchery, or for any other immoral purpose," ⁴ the Supreme Court in the 1917 case of *Caminetti v. United States* ⁵ sustained the imprisonment of two amateur philanderers who took two girls on an interstate week-end under a statute which was, as its formal title—the "White Slave Traffic

* *Cleveland v. United States*, 67 Sup. Ct. 13 (U. S. 1946), *rehearing denied*, 15 U. S. L. WEEK 3235 (U. S. 1946).

1. 5 Wheat. 76, 95 (U. S. 1820).

2. 36 STAT. 825 (1910), 18 U. S. C. §§ 397-404 (1940).

3. Strict construction and deference to legislative intent are not necessarily coextensive; they are at odds where the apparent legislative purpose is broader than the letter of the statute. Thus, in compliance with such supposed legislative purpose, the Supreme Court has found "person" in Section 7 of the Sherman Act, 26 STAT. 210 (1890), as amended, 38 STAT. 731 (1914), 15 U. S. C. § 15 (1940), to include states, *Georgia v. Evans*, 316 U. S. 159 (1942), but not the United States, *United States v. Cooper Corp.*, 312 U. S. 600 (1941); again, although there are no common law crimes against the United States, *Donnelley v. United States*, 276 U. S. 505, 511 (1928), the Court has found criminal a form of mail-theft mistakenly omitted from a statute on the theory that, "though penal laws are to be construed strictly . . . they are not to be construed so strictly as to defeat the obvious intention of the legislature." *United States v. Lacher*, 134 U. S. 624, 628 (1890). The problem raised by the present discussion is the more usual case of a penal statute whose literal meaning creates a broader area of liability than was intended by the legislature. By ascertaining the legislative will the Court has, in cases of this sort, found that one who hires a minister to preach does not make a contract for "labor or service," *Holy Trinity Church v. United States*, 143 U. S. 457 (1892), that one who arrests a postman does not "knowingly and willfully obstruct or retard the passage of the mail," *United States v. Kirby*, 7 Wall. 482 (U. S. 1869), and that one who commits robbery on a foreign ship is not committing a federal crime because although "the words 'any person or persons,' are broad enough to comprehend every human being . . . general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them." *United States v. Palmer*, 3 Wheat. 610, 631 (U. S. 1818).

4. 36 STAT. 825 (1910), 18 U. S. C. §§ 398-9 (1940).

5. 242 U. S. 470 (1917).

Act"⁶—suggests and Congressional history⁷ confirms, directed exclusively at the activities of the professional procurer. The majority of five⁸ defended its holding that the "immoral purpose" proscribed by the Mann Act was meant to cover noncommercial sexual immorality on the basis that "the name given to an act by way of designation or description, or the report which accompanies it, cannot change the plain import of its words."⁹ This denial of ambiguity through refusal to recognize its sources is deviational. The Court, sensitive to the social context of legislation, has frequently resorted to the legislative history of statutes whose apparent scope is alleged to belie Congressional intent.¹⁰ Applying its "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers,"¹¹ the Court has, in construing penal laws, subordinated syntax to logic both where the action alleged is clearly legal unless the ambiguous statute applies¹² and where the action is undoubtedly illegal but is outside the intended scope of the particular statute invoked.¹³ For thirty years, however,

6. 36 STAT. 827 (1910), 18 U. S. C. § 404 (1940). "The characteristic which distinguishes the 'white-slave trade' from immorality in general is that the women who are the victims of the traffic are unwillingly forced to practice prostitution. The term 'white slave' includes only those women and girls who are literally slaves—those women who are owned and held as property and chattels—whose lives are lives of involuntary servitude; those who practice prostitution as a result of the activities of the procurer. . . ." H. R. REP. NO. 47, 61st Cong., 2d Sess. (1909) 10-1; SEN. REP. NO. 886, 61st Cong., 2d Sess. (1910) 11.

The Mann Act of course applies to the transportation not only of white women but of "any woman or girl." 36 STAT. 825 (1910), 18 U. S. C. §§ 398-9 (1940); *United States v. Jamerson*, 60 F. Supp. 281 (N. D. Iowa 1944). Despite Congressional emphasis on the frequently involuntary status of the prostitute, Section 3 of the Mann Act specifically makes irrelevant to liability the question whether the criminal act of successfully inducing a woman to be transported is accomplished "with or without her consent." 36 STAT. 825 (1910), 18 U. S. C. § 399 (1940); *United States v. Williams*, 55 F. Supp. 375, 378 (D. Minn. 1944). Moreover the Court has construed Section 2 of the Act, making criminal intentional transportation or assistance therein, 36 STAT. 825 (1910), 18 U. S. C. § 398 (1940), to include cases where the woman is willing to be transported. *United States v. Holte*, 236 U. S. 140, 145 (1915); cf. *Gebardi v. United States*, 287 U. S. 112, 118, 121 (1932); *United States v. Beach*, 324 U. S. 193 (1945).

7. 45 CONG. REC. 545-51, 804-23, 1030-41, 9037-42 (1910); H. R. REP. NO. 47, 61st Cong., 2d Sess. (1909); SEN. REP. NO. 886, 61st Cong., 2d Sess. (1910). See *infra* pp. 725-7.

8. Justice Day wrote the opinion of the Court, and Justice McKenna wrote the dissent in which Chief Justice White and Justice Clarke concurred; Justice McReynolds, who had been Attorney General at the initiation of the prosecution, did not participate in the decision. For the political background of the *Caminelli* case see *infra* pp. 727-8.

9. 242 U. S. 470, 490 (1917).

10. *United States v. United Mine Workers*, 15 U. S. L. WEEK 4282 (U. S. 1947); *United States v. South-Eastern Underwriters Association*, 322 U. S. 533 (1944); *Helvering v. Griffiths*, 318 U. S. 371 (1943); *Nye v. United States*, 313 U. S. 33 (1941).

11. *Holy Trinity Church v. United States*, 143 U. S. 457, 459 (1892).

12. *Ibid.*; *United States v. Kirby*, 7 Wall. 482 (U. S. 1869).

13. *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940); *McBoyle v. United States*, 283 U. S. 25 (1931); *United States v. Palmer*, 3 Wheat. 610 (U. S. 1818).

the *Caminetti* construction of the Mann Act has been the law,¹⁴ breeding criticism of the Court¹⁵ and blackmail of the interstate traveler.¹⁶ The holding was not directly reconsidered by the Court until the recent case of *Cleveland v. United States*,¹⁷ which presented the application of the Act to a new realm of "immoral purpose."

14. *Sipe v. United States*, 150 F. (2d) 984 (App. D. C. 1945), *cert. denied*, 326 U. S. 788 (1946); *United States v. Reginelli*, 133 F. (2d) 595 (C. C. A. 3d, 1942), *cert. denied*, *Reginelli v. United States*, 318 U. S. 783 (1943); *Elrod v. United States*, 266 Fed. 55 (C. C. A. 6th, 1920).

15. Rogers, *The Mann Act and Noncommercial Vice* (1933) 37 L. NOTES 107; Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes* (1939) 25 WASH. U. L. Q. 2, 7-8; Jones, *Statutory Doubts and Legislative Intention* (1940) 40 COL. L. REV. 957, 961.

16. The danger of blackmail was urged in Congressional opposition to passage of the Mann Act, 45 CONG. REC. 1033 (1910), was noted in judicial opinion and dissent when the Court construed Section 2 of the Act to include the transportation of an acquiescent woman, *United States v. Holte*, 236 U. S. 140, 145, 148 (1915), and was argued in pre-*Caminetti* warnings against extending the Act beyond the limits of commercial prostitution. Davids, *Construction of the "Mann Act"* (1914) 17 L. NOTES 225; Davids, *Application of the Mann Act to Noncommercial Vice* (1916) 20 L. NOTES 144. Justice McKenna's *Caminetti* dissent adverted to the probability that the Court's holding would extend the already established pattern of Mann Act blackmail. *Caminetti v. United States*, 242 U. S. 470, 502 (1917). The prophecy has been fulfilled by a system of extortion, Rogers, *supra* note 15, at 107-8, to which federal courts may become reluctant partners, *Yoder v. United States*, 80 F. (2d) 665 (C. C. A. 10th, 1935), against which the Federal Bureau of Investigation has had only limited success, COOPER, *DESIGNS IN SCARLET* (1939) 152-5, and with which dissenting justices continue to tax the Court. *United States v. Beach*, 324 U. S. 193, 199-200 (1945).

17. 67 Sup. Ct. 13 (U. S. 1946), *rehearing denied*, 15 U. S. L. WEEK 3235 (U. S. 1946). Aside from the *Caminetti* and *Cleveland* decisions, the Court has considered the Mann Act's "immoral purpose" nine times. In four pre-*Caminetti* cases the Court upheld the Act's constitutionality. *Hoke v. United States*, 227 U. S. 308 (1913); *Athanasaw v. United States*, 227 U. S. 326 (1913); *Bennett v. United States*, 227 U. S. 333 (1913); *Wilson v. United States*, 232 U. S. 563 (1914). In a fifth the Court, with two justices dissenting, reversed the dismissal of an indictment for conspiracy to violate the Act of a woman accused of having helped plan her own transportation. *United States v. Holte*, 236 U. S. 140 (1915). Subsequently the Court, parenthetically acknowledging the intervening *Caminetti* doctrine when it was not in issue, reversed a conspiracy conviction where the evidence failed to show that the defendant had done more than acquiesce in her own transportation. *Gebardi v. United States*, 287 U. S. 112, 120 (1932). The Court, four justices dissenting, reversed the conviction of a brothel-keeper and his wife where there was no evidence that taking two prostitutes on an interstate vacation was intended to secure the girls' ultimate resumption of employment; but the Court there refused to "reconsider any previous construction placed on the Act which may have led the federal government into areas of regulation not originally contemplated by Congress." *Mortensen v. United States*, 322 U. S. 369, 376 (1944); *accord*, *Oriolo v. United States*, 324 U. S. 824 (1945). With two justices dissenting, the Court held that the Act forbade the transportation wholly within the District of Columbia of an acquiescent prostitute, *United States v. Beach*, 324 U. S. 193 (1945), reversing a holding that the Mann Act had been superseded within the District by the passage of ordinances so strictly regulating the practice of prostitution that "about the only place in which the act can be done without running athwart the local law is in an anchored balloon." *Beach v. United States*, 144 F. (2d) 533, 535 (App. D. C. 1944).

The defendants in the *Cleveland* case were fundamentalist Utah Mormon adherents of polygamy, a practice long forbidden by the two principal Mormon sects.¹⁸ Five of the defendants had transported or paid for the transportation of one or more of their "celestial" wives across state lines; the sixth had assisted in transporting a co-defendant's "celestial" wife. On these stipulated facts, all six were found guilty and given jail sentences ranging from three to four years.¹⁹ The convictions were affirmed by the circuit court of appeals.²⁰ On certiorari²¹ four grounds of reversal were urged: (1) the intent to continue sexual intercourse was only incidental to the interstate travel of those petitioners customarily engaged in polygamous intercourse prior to such travel, (2) any transportation of women with intent to practice polygamy was a protected exercise of religious freedom, (3) the Mann Act, contrary to the *Caminetti* decision, was not designed to include noncommercial immorality, and (4) polygamy was not "immoral" even within the meaning of the challenged *Caminetti* rule. The Supreme Court upheld the lower courts, with Justice Douglas writing an opinion in which the Chief Justice, and Justices Reed, Frankfurter and Burton joined.²²

There was no explicit dissent from the majority's rejection of the first two grounds of incidental intent and religious freedom. However, Justice Rutledge in concurrence and Justice Murphy in dissent agreed with the petitioners' third contention that the *Caminetti* construction of the Mann Act was in error. From the majority's dismissal of the fourth contention Justices Black and Jackson dissented: finding the *Caminetti* rule to be "so dubious that it should at least be restricted to its particular facts,"²³ they adhered by implication to Justice Murphy's secondary ground of dissent that polygamy was not akin to the seduction proscribed by the *Caminetti* case. This was in contrast with the rationale of Justice Rutledge's concurrence that the cases were indistinguishable and that the *Cleveland* convictions could not be reversed while the erroneous *Caminetti* rule was still prevailing law. Considered one by one, the arguments vainly advanced by the *Cleveland* petitioners serve to underline the major problems of judicial construction raised by the Mann Act.

The petitioners' initial insistence that their travels were not motivated

18. Utah Mormons gave up polygamy after the 1890 Manifesto issued by President Wilford Woodruff of the Church of Jesus Christ of Latter-Day Saints. SHOOK, *THE TRUE ORIGIN OF MORMON POLYGAMY* (1914) 203-4. The smaller Reorganized Church of Jesus Christ of Latter-Day Saints, centering in the Mississippi Valley among the Mormons who did not follow Brigham Young to Utah, never recognized polygamy. BEARDSLEY, *JOSEPH SMITH AND HIS MORMON EMPIRE* (1931) 298. The handful of contemporary Utah fundamentalist revivers of polygamy have met strenuous opposition from the cleansed Utah Church. BRODIE, *NO MAN KNOWS MY HISTORY: THE LIFE OF JOSEPH SMITH* (1945) 401.

19. *United States v. Cleveland*, 56 F. Supp. 890 (D. C. Utah 1944).

20. *Cleveland v. United States*, 146 F. (2d) 730 (C. C. A. 10th, 1945).

21. *Cleveland v. United States*, 324 U. S. 835 (1945).

22. *Cleveland v. United States*, 67 Sup. Ct. 13 (U. S. 1946).

23. *Id.* at 16.

by a desire to continue sexual intercourse was in essence an assault on the sufficiency of the Government's proof of "immoral purpose." The necessary extent of proof of an interstate trip's motivation, which is the crux of liability under the Mann Act, is susceptible of attenuated doctrinal refinements. Thus sexual intercourse subsequent to an interstate trip is not in itself unlawful;²⁴ moreover, "if the sole purpose of the trip is legitimate, a purely incidental intent to have intercourse is not a federal offence,"²⁵ but an "immoral purpose" may make criminal a trip also motivated by an alternative and entirely legitimate purpose.²⁶ It may at least be questioned whether the distinction between an "immoral purpose" to have intercourse and an "incidental intent to have intercourse" is a criterion of criminality responsive to factual differentiation; but in the instant case the petitioners' insistence thereon ran afoul of the Court's reluctance to review facts ascertained below, since there was "evidence that this group of petitioners in order to cohabit with their plural wives found it necessary or convenient to transport them in interstate commerce. . . ." ²⁷

A possible realm of further refinement was thrown open by the Court's finding that the "immoral purpose" was the "dominant motive."²⁸ This brought the *Cleveland* case within the letter of what was essentially a dictum in the 1944 case of *Mortensen v. United States* that to violate the Mann Act an "intention that the women or girls shall engage in the conduct outlawed . . . must be the dominant motive . . . of the interstate movement."²⁹ The *Mortensen* case held that two girls' resumption of prostitution at the end of a round-trip vacation permitted no inference that their employers had taken them on the vacation for an "immoral purpose," or that the purpose of the return travel was separably criminal where that of the outgoing travel was entirely innocent. Application of the "dominant motive" rule to the *Cleveland* case would suggest that the Government must now prove the "immoral purpose" to be the primary reason for transportation where two or more reasons may exist,³⁰ but the failure of the district court in the in-

24. *Alpert v. United States*, 12 F. (2d) 352 (C. C. A. 2d, 1926); *Fisher v. United States*, 266 Fed. 667 (C. C. A. 4th, 1920); *Biggerstaff v. United States*, 260 Fed. 926 (C. C. A. 8th, 1919).

25. *Yoder v. United States*, 80 F. (2d) 665, 672 (C. C. A. 10th, 1935); *accord*, *Van Pelt v. United States*, 240 Fed. 346 (C. C. A. 4th, 1917); *Welsch v. United States*, 220 Fed. 764 (C. C. A. 4th, 1915).

26. *Ghadiali v. United States*, 17 F. (2d) 236 (C. C. A. 9th, 1927), *cert. denied*, 274 U. S. 747 (1927); *Carey v. United States*, 265 Fed. 515 (C. C. A. 8th, 1920).

27. 67 Sup. Ct. 13, 16 (U. S. 1946).

28. *Ibid.*

29. 322 U. S. 369, 374 (1944).

30. Prior to the *Cleveland* case, the *Mortensen* case might logically have been distinguished from the duality-of-purpose cases, since it is not on its facts necessarily apposite to the latter; a clear basis of distinction would seem to have been that the *Mortensen* case required an "immoral purpose" to be "dominant" in the sense that it must precede the first element of a compound interstate trip, rather than that it must outweigh any legitimate

stant case to make explicit finding of an unlawful "dominant motive" prompts doubt whether the "dominant motive" rule works more than a verbal change in the Government's burden of proof.³¹

alternative purpose of an isolated crossing of state lines. See *Oriolo v. United States*, 324 U. S. 824 (1945), *rev'g* *United States v. Oriolo*, 146 F. (2d) 152 (C. C. A. 3d, 1944). However, in the decisions intervening between *Mortensen* and *Cleveland* no such distinction was in fact articulated. The *Mortensen* decision was considered in two round-trip cases, being distinguished where the halves of the trip were clearly separable, *Sipe v. United States*, 150 F. (2d) 984 (App. D. C. 1945), *cert. denied*, 326 U. S. 788 (1946), and being applied where they were not, *Oriolo v. United States*, *supra*. In one case of possible duality of purpose, however, the *Mortensen* case was distinguished on the ground that the Supreme Court had there found evidence of no "immoral purpose," and it was held that "the Mann Act does not require that the interstate transportation need be solely for immoral purposes, if such purpose constitute one of the reasons for this transportation." *Simon v. United States*, 145 F. (2d) 345, 347 (C. C. A. 4th, 1944); see note 31 *infra*.

The facts in the *Cleveland* case suggest that the defendants' intricate interstate travels in 1942 and 1943, on which the indictments were based, may have facilitated but were not essential to the practice of polygamous intercourse. Brief for United States, pp. 6-12, *Cleveland v. United States*, 67 Sup. Ct. 13 (U. S. 1946). This picture might have changed abruptly without federal intervention, since in 1944 petitioners Cleveland and Darger, along with thirteen others, were convicted of bigamous cohabitation by the State of Utah. *State v. Barlow*, 107 Utah 292, 153 P. (2d) 647 (1944), *appeal dismissed*, *Barlow v. Utah*, 324 U. S. 829 (1945). Heretofore Mann Act prosecutions of bigamists have been infrequent: in the case of one who took a girl from New Jersey to Pennsylvania for a bigamous marriage and on another occasion had intercourse with her in New York, the conviction was reversed, *Gerbino v. United States*, 293 Fed. 754 (C. C. A. 3d, 1923); in the case of one who took a girl from the District of Columbia to Virginia, where they were bigamously married, and then back to the District where they subsequently had intercourse, the conviction was affirmed, *Burgess v. United States*, 294 Fed. 1002 (App. D. C. 1924). *Cf. Drossos v. United States*, 16 F. (2d) 833 (C. C. A. 8th, 1927).

31. It should be noted that the district court's opinion gives no affirmative indication that the *Cleveland* petitioners argued the doctrine of incidental intent at their trial; the district court opinion was handed down on May 22, 1944, one week after the *Mortensen* decision. The circuit court of appeals distinguished the *Mortensen* case as being one in which the Court had found no "immoral purpose." *Cleveland v. United States*, 146 F. (2d) 730, 734 (C. C. A. 10th, 1945). If, however, the *Cleveland* majority intended the "dominant motive" test to be a rule of proof, even the petitioners' failure to urge it at trial should not have waived retrial in accordance with the statutory standard. Thus in *Screws v. United States*, 325 U. S. 91 (1945), the Supreme Court reversed the convictions of three Georgia peace officers who had beaten to death an arrested Negro and had been given two-year jail sentences for depriving the deceased of his federal constitutional right to a fair trial in violation of the Civil Rights Act, 35 STAT. 1092 (1909), 18 U. S. C. § 52 (1940); the Court narrowed the statute to require a showing of "purpose" to deprive the deceased of his constitutional right and remanded for correction of the trial court's instructions to the jury, holding through Justice Douglas that "where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it necessary to take note of it on our own motion." 325 U. S. 91, 107 (1945). The fact that the *Cleveland* case was tried to a court rather than a jury does not raise a presumption that the trial judge applied the week-old *Mortensen* rule to the varying facts of each petitioner's transgression, especially where the circuit court specifically distinguished the *Mortensen* case. Indeed the Supreme Court granted certiorari because of "asserted conflict between the decision below and *Mortensen v. United States*." *Cleveland v. United States*, 67

No new question was presented to the Court by the petitioners' second contention, that their religious faith rendered them constitutionally immune from prosecution under the Mann Act; nor can issue be taken with the Court's summary disposal of this proposition. The most dissident religious beliefs are protected from federal interference by the First Amendment³² and from state interference by the Fourteenth,³³ but this protection is lost when belief is coupled with overt action which the United States or the state has the constitutional power to regulate.³⁴ Since Congressional power over interstate commerce is plenary,³⁵ and since the transportation of persons is commerce,³⁶ the interstate transportation of women by a Mormon polygamist is subject to federal regulation of interstate commerce³⁷ just as the intrastate sale of religious magazines by a Jehovah's Witness is subject to state regulation of child labor.³⁸ The Court's problem in the *Cleveland* case was, therefore, not one of Congressional power but of Congressional intent to make criminal the transportation of women across state lines where one of the purposes was polygamous cohabitation.

This question of Congressional intent had of course received some consideration in the *Caminetti* case, reaffirmance of which was a necessary if not an inevitably sufficient premise for affirmance of the *Cleveland* convictions. To redetermine the meaning of the Mann Act, Justice Douglas for the majority applied to the statutory phrase, "prostitution or debauchery, or . . . any other immoral purpose," the *eiusdem generis* rule of construction that general words are restricted by preceding particular words.³⁹ "Immoral purpose," it was held, is limited by "debauchery," which lacks the

Sup. Ct. 13, 14 (U. S. 1946). If the "dominant motive" rule is now one of "the essential ingredients of the . . . offense," the Court should have required that the many petitioners' many motives be relitigated under the stricter rule.

32. *United States v. Ballard*, 322 U. S. 78 (1944).

33. *Marsh v. Alabama*, 326 U. S. 501 (1946); *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943); *Murdock v. Pennsylvania*, 319 U. S. 105 (1943); *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

34. *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942); *Mormon Church v. United States*, 136 U. S. 1 (1890); *Reynolds v. United States*, 98 U. S. 145 (1879); cf. *In re Summers*, 325 U. S. 561 (1945); see *Hamilton v. Regents*, 293 U. S. 245, 263-4 (1934); *United States v. Macintosh*, 283 U. S. 605, 623-4 (1931); *Jacobson v. Massachusetts*, 197 U. S. 11, 29 (1905). The conceptual identity of federal and state power over religion arises from the transfer of the freedoms of the First Amendment, limited by the "clear and present danger" test, *Schenck v. United States*, 249 U. S. 47, 52 (1919), to the status of "liberty" within the meaning of the "due process" clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U. S. 652, 666 (1925); *Near v. Minnesota*, 283 U. S. 697 (1931).

35. *United States v. Darby*, 312 U. S. 100 (1941); *Mulford v. Smith*, 307 U. S. 38 (1939).

36. *Edwards v. California*, 314 U. S. 160 (1941).

37. See *Chatwin v. United States*, 326 U. S. 455, 460 (1946). "If a man is compelled by his faith to commit polygamy, thuggery, or widow-burning, the Constitution will not protect him." CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941) 405.

38. *Prince v. Massachusetts*, 321 U. S. 158 (1944).

39. *United States v. Bitty*, 208 U. S. 393, 402 (1908); *Hansen v. Haff*, 291 U. S. 559, 562 (1934). But cf. *Gooch v. United States*, 297 U. S. 124 (1936), where the Court construed

connotation of commercialism inherent in "prostitution" and hence implies no such limitation on "immoral purpose." Having established the "natural import" ⁴⁰ of the statute—as Justice Day in the *Caminetti* case had established its "plain import" ⁴¹—Justice Douglas, feeling polygamy to be a "notorious example of promiscuity," relied on cases arising out of federal regulation of polygamy in the territories prior to Utah's statehood ⁴² to show that polygamy is an "immoral" practice which has "long been outlawed in our society." ⁴³ Thus in the *Cleveland* case, as in the *Caminetti* case, the Court required no reference to legislative history to reject the contention that the Mann Act was intended only to include commercial sexuality. But the challenge directed at the *Caminetti* rule might reasonably have required the *Cleveland* majority to reconsider the Act in terms of the many concrete evidences of Congressional intent.

The Mann Act was adopted in 1910 as a supplement to stringent immigration controls ⁴⁴ enacted pursuant to an international agreement ⁴⁵ aimed at breaking up a world-wide prostitution market. ⁴⁶ Designed to stop the systematized importation and interstate transportation of prostitutes which state and local authorities were helpless to regulate, ⁴⁷ the Act has apparently been highly effective as applied to professional procurers. ⁴⁸ That the Act

a penal statute broadly by refusing to apply the rule of *eiusdem generis* since "it may not be used to defeat the obvious purpose of legislation." *Id.* at 128.

40. 67 Sup. Ct. 13, 15 (U. S. 1946).

41. 242 U. S. 470, 490 (1917).

42. *Reynolds v. United States*, 98 U. S. 145 (1879); *Mormon Church v. United States*, 136 U. S. 1 (1890).

43. 67 Sup. Ct. 13, 15-6 (U. S. 1946).

44. 34 STAT. 899 (1907). This statute excluded alien prostitutes and made criminal their importation; it was replaced by 39 STAT. 878 (1917), 18 U. S. C. § 138 (1940), and the Mann Act.

45. Paris Agreement of May 18, 1904, ratified by the Senate on March 1, 1905, and proclaimed effective as to the United States by President Roosevelt on June 15, 1903. 35 STAT. 1979 (1908).

46. See REP. SEC'Y COMMERCE AND LABOR (1908) 18; SEN. DOC. NO. 196, 61st Cong., 2d Sess. (1909); 45 CONG. REC. 813, 1036-7 (1910).

47. *Id.* at 550; H. R. REP. NO. 47, 61st Cong., 2d Sess. (1909) 10; SEN. REP. NO. 886, 61st Cong., 2d Sess. (1910) 10.

48. The number of convictions under the Act has risen from an annual average of about 300 in the first twelve years of its enforcement, REP. ATT'Y GEN. (1922) 71, to an annual average of about 400 in the twelve years prior to World War II, REPS. ATT'Y GEN. (1930-41), corresponding closely to the 30% rise in national population between the mean years of these two twelve-year periods. 1 SIXTEENTH CENSUS: 1940 (1943) 14. The proportion of these convictions attributable to noncommercial immorality prosecutions is estimated by enforcement officials at about 2%; unfortunately the Federal Bureau of Investigation, according to a Communication to YALE LAW JOURNAL from J. Edgar Hoover, January 27, 1947, makes no statistical breakdown as between commercial and noncommercial cases. But sharp annual fluctuations in the number of Mann Act convictions suggest that such statistics are not an accurate gauge of the quantum of the underlying crime, reflecting rather the amount of time which the Federal Bureau of Investigation can devote to Mann Act enforcement as opposed to its other enforcement jobs: sharp drops in convictions during

was restricted to procurers is clear from the extended Congressional debates which made repeated reference to the need for regulating commercialized vice⁴⁹ but which at no time asserted the need for a wider area of regulation.⁵⁰ This limited purpose was underlined by Representative Mann's Report on his proposed bill:

"The legislation is not needed or intended as an aid to the states in the exercise of their police powers in the suppression or regula-

World War I and during the bank-robbing and kidnaping era of the early 'thirties are indicative. Better indices of the effect of the Mann Act are a 1922 statement of the Department of Justice that "the organized white-slave gangs which formerly existed have been very thoroughly broken up," REP. ATT'Y GEN. (1922) 71, and a Communication to YALE LAW JOURNAL from Bascom Johnson, Associate Director of the American Social Hygiene Association, December 28, 1946, who feels that the threat of the Mann Act has been so effective as to make present control of commercial prostitution an almost exclusively local problem. Such prosecutions as are brought do not lack vigor; the Annual Reports of the Attorney General show that the average jail sentence imposed has risen from under two years in the early stages of the Act's enforcement to about three years today. In terms of quantity of convictions, the Mann Act is one of the most important of federal penal statutes; since the end of Prohibition, the National Motor Vehicle Act, 41 STAT. 324 (1919), 18 U. S. C. § 408 (1940), penalizing the interstate transportation of stolen cars, has led the field with an annual average of about 2000 convictions; convictions for violation of the Mann Act and for the theft of goods in interstate commerce are tied for second place. See generally, REPS. ATT'Y GEN. (1910-41).

49. The words of Congressman Sims are representative: "Now, what is the man procuring this woman for? For what purpose does he bring her from a foreign country? To make money. To make merchandise of a human soul. . . . The poor, deluded female perhaps would not be able to make the trip were it not for the demon, in human form, who is furnishing the money to carry her there, to sell her soul and body into hell, in order that he may have a few more dollars to put into his unholy pocket." 45 CONG. REC. 812 (1910). See *id.* at 547, 549-50, 811, 821.

50. Notwithstanding the insistent concern with commercial vice evidenced by Congressional debate, it has been suggested that the words "immoral purpose" may have been used in the Mann Act in conscious recognition of the Court's holding in *Bitty v. United States*, 208 U. S. 393 (1908), that the 1907 immigration statute penalizing the importation of alien women "for the purpose of prostitution, or for any other immoral purpose," 34 STAT. 899 (1907), forbade the importation of a private mistress. See Brief for United States, pp. 16-7, *Cleveland v. United States*, 67 Sup. Ct. 13 (U. S. 1946). The *Bitty* holding was known to the Congress of 1910: it was mentioned once during the Mann Act debates—favorably, but by an opponent of the Act, 45 CONG. REC. 809 (1910); it was mentioned once in the House and Senate Reports in discussions of the Mann Act's constitutionality. H. R. REP. NO. 47, 61st Cong., 2d Sess. (1909) 7; SEN. REP. NO. 386, 61st Cong., 2d Sess. (1910) 4. It is entirely possible that "immoral purpose" meant more than commercial prostitution to some members of Congress. If, however, the words were generally accepted by Congress as a term of art including all extra-marital sexual relations, it is remarkable that those leading the strenuous Congressional opposition to what was in any event a radical increase in federal police power should have failed to point out the discrepancy between the implications of the phrase and the House Report's expressly contrary analysis. See note 51 *infra*. That Congress in fact recognized the confined purpose of the Mann Act seems clear from the normal tenor of debate: "Mr. Speaker, the considerations which prompt the support of this bill are so widespread and its objects are so well understood and meet with such universal approval that no explanation or repetition of them need be made to this House. The

tion of immorality in general. It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panders and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution."⁵¹

By not considering the background of legislative intent, Justice Douglas obviated the need for evaluating alleged Congressional acquiescence in the *Caminetti* rule. A superficial basis for what the Government in the *Cleveland* case described as "unquestioned acceptance by Congress"⁵² of a broad interpretation of the Act is found in the fact that the trial of Caminetti and his co-defendant Diggs was a national event which Congress enlivened with panegyrics on American womanhood and with demands for speedy trial.⁵³ But the force of this statutory interpretation, weakened by its patently ex post facto operation, is further diluted by the partisan background of the prosecution: Representative Mann and his Republican colleagues were eager to show that Democratic Immigration Commissioner Caminetti was the father of one of the accused and that Democratic President Wilson and Attorney General McReynolds were responsible for delaying Republican

bill aims to aid in the suppression of the white-slave traffic by making it a felony to purchase interstate transportation for any woman going to a place for purposes of prostitution." 45 CONG. REC. 1035 (1910). The sole contested issues were the constitutionality and the underlying desirability of what was conceived by the Mann Act's opponents to be a federal encroachment on state power. *Id.* at 810-1, 1030-5.

The *Bitty* decision, relied on by the Court in both the *Caminetti* and *Cleveland* cases, has even less value as legal precedent than as a guide to Congressional intent. As Justice Murphy pointed out, *Cleveland v. United States*, 67 Sup. Ct. 13, 19-20 (U. S. 1946), application of the *Bitty* case to the *Cleveland* case is entirely self-defeating, since the statute construed in the *Bitty* case specifically distinguished between polygamists and prostitutes, excluding both as undesirable aliens but making criminal the importation only of the latter, 34 STAT. 899 (1907), with the result that Congress in the immigration statute clearly intended not to include the practice of polygamy within the ambit of "immoral purpose." Furthermore, the Court has demonstrated that, within the limits of its own syntactical rules, the *Bitty* case, holding criminal the importation of a woman with intent to have her live in dependence as defendant's concubine, was misapplied to the *Caminetti* case which proscribes not only the intent to establish concubinage but the intent to engage in free-will fornication: in *Hansen v. Haff*, 291 U. S. 559, 562 (1934), the Court dismissed an exclusion order directed against a returning resident alien who admitted intending to have intercourse with a man to whom she was not married but by whom she was not supported: "The principle of *ciusdem generis* limits the connotation of the words 'any other immoral purpose' to such as are of like character with prostitution, *United States v. Bitty*, 208 U. S. 393, 401; and extra-marital relations, short of concubinage, fall short of that description." The *Bitty* case is either irrelevant to the meaning of the Mann Act, as Justice McKenna suggested in his *Caminetti* dissent, 242 U. S. 470, 502 (1917), or else it is authority for the proposition that both the *Caminetti* and *Cleveland* decisions were in error.

51. H. R. REP. No. 47, 61st Cong., 2d Sess. (1909) 9-10; SEN. REP. No. 886, 61st Cong., 2d Sess. (1910) 10. That the woman's acquiescence to transportation is irrelevant, see note 6 *supra*.

52. Brief for United States, p. 17.

53. 50 CONG. REC. 2532-3, 2874-900, 3006-23 (1913).

United States Attorney McNabb in the administration of righteous and impartial justice;⁵⁴ Democratic Congressmen had no feasible political choice but to demonstrate their own enthusiasm for federally protected chastity,⁵⁵ although they did not neglect to point out that a Republican Attorney General had in 1912 held noncommercial interstate seduction to be outside the scope of the Mann Act.⁵⁶ The only other index of Congressional opinion is the demise in committee of two bills designed to narrow the *Caminetti* rule.⁵⁷ Justice Rutledge's view that the oft-invoked doctrine of Congressional silence⁵⁸ should not raise these twin acts of legislative omission to the status of affirmative lawmaking⁵⁹ is supported by *Helvering v. Hallock*⁶⁰ in which two prior interpretations⁶¹ of a thrice reenacted tax statute were disapproved, and *Girouard v. United States*⁶² in which three prior interpretations⁶³ of an immigration statute reenacted in the face of eight bills devised to nullify the interpretations were overruled because, in Justice Douglas' words, "we do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error."⁶⁴

Assuming the validity of the *Caminetti* holding, the *Cleveland* case can be distinguished, as Justice Murphy indicated, on the theory that polygamy is an ancient and comprehensive form of family organization whose purpose is not the mere sexual lust proscribed by the Mann Act.⁶⁵ If, however, the

54. 50 CONG. REC. 2874-82, 2886 (1913).

55. See, e.g., the speech of Kentucky's Congressman Barkley, *id.* at 2892-5.

56. See *id.* at 2906, 3018; cf. McKenna, J., dissenting in *Caminetti v. United States*, 242 U. S. 470, 498-9 (1917).

57. S. 2438, 73d Cong., 2d Sess. (1934); S. 101, 75th Cong., 1st Sess. (1937).

58. See, e.g., *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 488-9 (1940).

59. *Cleveland v. United States*, 67 Sup. Ct. 13, 17-8 (U. S. 1946).

60. 309 U. S. 106 (1940).

61. *Helvering v. St. Louis Trust Co.*, 296 U. S. 39 (1935); *Becker v. St. Louis Trust Co.*, 296 U. S. 48 (1935).

62. 328 U. S. 61 (1946).

63. *United States v. Schwimmer*, 279 U. S. 644 (1929); *United States v. Macintosh*, 283 U. S. 605 (1931); *United States v. Bland*, 283 U. S. 636 (1931).

64. *Girouard v. United States*, 328 U. S. 61, 69-70 (1946).

65. Justice Murphy's view that polygamy has been as basic and widespread a cultural form as monogamy, 67 Sup. Ct. 13, 19 (U. S. 1946), is disputed by a leading cultural anthropologist. Malinowski, *Marriage* in 14 ENCYC. BRITANNICA (14th ed. 1929) 940, 950. Mormon polygamy was the inspiration of a neurotic leader, BEARDSLEY, *op. cit. supra* note 18, at 81-2, but it was responsive to at least one identifiable social need of a frontier people in contributing to the territory's rapid population growth, II SIXTEENTH CENSUS: 1940 (1943) pt. 7, p. 14. The theory that polygamy would integrate into the community an excess female population, EVANS, JOSEPH SMITH: AN AMERICAN PROPHET (1933) 267-8, fails as to Utah, which during the polygamous period of 1850 to 1890 had a continuous surplus of men. II SIXTEENTH CENSUS: 1940 (1943) pt. 7, p. 14. Notable however is the hope that polygamy would put an end to prostitution, BRODIE, *op. cit. supra* note 18, at 185; prostitution appears to have been almost unknown in Utah until the demise of polygamy. EVANS, *op. cit. supra*, at 272-3.

Caminetti rule is taken to mean that an "immoral" sexual purpose is measured by its degree of departure from accepted American mores, it is hardly to be denied that polygamy is even less conventional than seduction and is, as Justice Douglas pointed out, a "permanent advertisement" of unorthodox sexual relations.⁶⁶ Whether or not the cases can be distinguished, it is at least clear that the *Cleveland* convictions cannot stand without the *Caminetti* rule. And it is no answer to criticism of the rule to say that the few prosecutions brought thereunder⁶⁷ are generally those which the Department of Justice feels to be aggravated cases—as where the girl is a minor, or where dependent children are left without support.⁶⁸ The discretion, lying in theory with the Attorney General and in practice with the local United States Attorney,⁶⁹ is misplaced;⁷⁰ for if the *Caminetti* rule is valid many violators of federal law are being deliberately sheltered from punishment, and if the rule is invalid the innocent are being imprisoned.

Whatever doubts exist as to the true meaning of a penal statute should be resolved in favor of the accused. Indeed, a curious footnote to the judicial process is the Court's application of the doctrine of strict construction in *Chatwin v. United States*,⁷¹ a companion to the *Cleveland* case below but appealed separately at the 1945 term of court. There the Mormon widower Chatwin and his two co-defendants had persuaded his "celestial" bride, a mentally defective fifteen-year old ward of a Utah juvenile court, to accompany Chatwin to Mexico where he became lawfully married to her.⁷² Convicted as kidnapers for having transported in foreign commerce one who had been "unlawfully . . . inveigled . . . by any means whatsoever and held for ransom or reward or otherwise,"⁷³ the defendants were freed by the Supreme Court without dissent.⁷⁴ Although the Kidnaping Act has been

66. 67 Sup. Ct. 13, 16 (U. S. 1946).

67. See note 48 *supra*.

68. Hoover, *Organized Protection Against Organized Predatory Crimes: White Slave Traffic* (1933) 24 J. AM. INST. CRIM. L. & CRIMINOLOGY 475, 477-8.

69. See *Confiscation Cases*, 7 Wall. 454, 457 (U. S. 1869); *United States v. Woody*, 2 F. (2d) 262, 263 (D. Mont. 1924); *cf. United States v. Bioff*, 40 F. Supp. 497, 498 (S. D. N. Y. 1941); see also FRANK, *IF MEN WERE ANGELS* (1942) 160.

70. Compare Llewellyn, *The Sacco-Vanzetti Case* in MICHAEL AND WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* (1940) 1085, 1087: "It is *not* for the official to judge whether an accused is socially undesirable. Only the legislature passes on that point, and the legislature must pass upon it not for single men, nor after the event, but for whole classes, and for whole classes chosen in advance. The only job and the only privilege of the official—district attorney, court, or jailer—is to deal with those who by some specific action have brought themselves within the classes thus laid down."

71. 326 U. S. 455 (1946).

72. See *Chatwin v. Terry*, 107 Utah 340, 153 P. (2d) 941 (1944). The Utah Supreme Court held that the girl, although legally married to her alleged abductor, must remain a ward of the Utah juvenile court until she is twenty-one.

73. 47 STAT. 326 (1932), as amended, 48 STAT. 781 (1934), 18 U. S. C. § 403a (1940).

74. Justice Burton concurred in the result; Justice Jackson did not participate in the decision.

construed to include abduction for the purpose of sexual intercourse,⁷⁵ the Court felt, in the light of the Kidnaping Act's legislative history, that persuasion of a defective child in knowing defiance of a juvenile court's jurisdiction was not evidence of the unlawful restraint which Congress intended to penalize.⁷⁶ Justice Murphy's opinion warned that "the broadness of the statutory language does not permit us to tear the words out of their context, using the magic of lexicography to apply them to unattractive or immoral situations lacking . . . the very essence of the crime."⁷⁷ By the same token, the majority in the *Cleveland* case might well have pondered Justice Douglas' recent holding for the Court that "the policy as well as the letter of the law is a guide to decision;"⁷⁸ the petitioners' guilt would at least seem to have been a matter of reasonable doubt—and a doubt not to be resolved by the "magic of lexicography" alone.

75. *Poindexter v. United States*, 139 F. (2d) 158 (C. C. A. 8th, 1943); *cf.* *Gooch v. United States*, 297 U. S. 124 (1936).

76. Why the *Chatwin* defendants were not grouped with their *Cleveland* comrades under Mann Act indictments is not clear from any of the opinions or from the Government's brief; presumably the difficulty lay in proving that the *Chatwin* defendants had an "immoral purpose" relative to the week which elapsed between the trip to Mexico and the marriage.

It is a matter of conjecture whether the *Chatwin* and *Cleveland* prosecutions preface a new chapter in the litigious history of American persecution of Mormonism, *cf.* Tappan, *The Mormons: Legal Constraints of a Minority* (1946) 4 J. LEG. & POL. Soc. 77, or whether orthodox Utah Mormons are now seeking to curb the unregenerate polygamist. See note 18 *supra*. Of interest is *United States v. Barlow*, 56 F. Supp. 795 (D. Utah 1944), *appeal dismissed*, 323 U. S. 805 (1944), quashing an indictment for conspiracy to mail obscene literature, in which the obscenity alleged was a series of articles favoring polygamy published in *Truth*, a fundamentalist Mormon periodical; *cf.* *State v. Barlow*, 107 Utah 292, 153 P. (2d) 647 (1944), *appeal dismissed*, *Barlow v. Utah*, 324 U. S. 829 (1945), cited *supra* note 30. The *Caminetti* case is but an instance of the kind of political capital which can be made by a United States Attorney who chooses his prosecutions with care.

77. *Chatwin v. United States*, 326 U. S. 455, 464 (1946).

78. *Markham v. Cabell*, 326 U. S. 404, 409 (1945).

DISCRIMINATION BY LABOR UNION BARGAINING REPRESENTATIVES AGAINST RACIAL MINORITIES*

Discrimination by labor unions against racial minorities, particularly Negroes, is still frequent¹ despite reforms by some unions in recent years.² Some unions positively refuse membership to Negroes. Others relegate them to "auxiliary" chapters under the domination of white locals, where they pay dues to the union but have no effective voice in its affairs.

The critical effects of such discrimination most clearly appear where the union has achieved substantial power. If the union has a closed shop contract, the denial of membership may result in exclusion from employment. Even without the closed shop, if the union has become a statutory bargaining representative, race discrimination may bar the minority from participation in the bargaining process. When a labor union is certified as bargaining agent under either the National Labor Relations Act³ or the Railway Labor Act,⁴ it becomes the exclusive bargaining agent for the craft.⁵ Minority members of the bargaining unit may neither choose another representative nor engage in individual bargaining upon subjects properly within the scope of the collective bargaining procedure.⁶ If their interests are not properly represented by the certified bargaining agent, they remain without representation and, indeed, with less power to further their own interests than they would have if there were no statutory process.⁷

A recent judicial effort to afford relief against race discrimination by a union acting as a statutory bargaining representative is the Kansas case of *Betts v. Easley*.⁸ A railway labor union was designated bargaining repre-

* *Betts v. Easley*, 161 Kan. 459, 169 P. (2d) 831 (1946).

1. A recent survey by the American Civil Liberties Union shows approximately thirty unions officially practicing discrimination against Negroes, some of them against other groups also. American Civil Liberties Union Bulletin No. 1249, Sept. 23, 1946. See generally PETERSON, HANDBOOK OF LABOR UNIONS (1944) (surveying membership requirements of International and National Unions in the American labor movement); NORTHROP, ORGANIZED LABOR AND THE NEGRO (1944); CAYTON AND MITCHELL, BLACK WORKERS AND THE NEW UNIONS (1939); SPERO AND HARRIS, THE BLACK WORKER (1931). There are of course many unions which do not practice race discrimination. See NORTHROP, *op. cit. supra* at 6-7.

2. See Brief for the National Association for the Advancement of Colored People as *amicus curiae*, p. 14 n. 22, *Tunstall v. Brotherhood*, 323 U. S. 210 (1944).

3. 49 STAT. 453 (1935), 29 U. S. C. § 159 (1940).

4. 48 STAT. 1188 (1934), 45 U. S. C. § 152 (1940).

5. See *Steele v. Louisville & N. R. R.*, 323 U. S. 192, 200 (1944); *Virginian Ry. v. Federation*, 300 U. S. 515, 544-5 (1937); 49 STAT. 453 (1935), 29 U. S. C. § 159a (1940).

6. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342 (1944); *J. I. Case Co. v. Labor Board*, 321 U. S. 332 (1944); *Medo Corp. v. Labor Board*, 321 U. S. 678 (1944); see *Steele v. Louisville & N. R. R.*, 323 U. S. 192, 200 (1944).

7. See *The Elimination of Negro Firemen on American Railways—A study of the Evidence Adduced at the Hearing Before the President's Committee on Fair Employment Practices* (1944) 4 LAW. GUILD REV. No. 2, p. 32.

8. 161 Kan. 459, 169 P. (2d) 831 (1946).

sentative under the Railway Labor Act for certain employees of the Santa Fe Railway. These included a number of Negroes who, during the prior existence of a company union, had enjoyed full union membership privileges. The newly designated union set about organizing, in accordance with its constitution,⁹ a separate lodge of Negroes "under the jurisdiction of and represented by the delegate of the nearest white local." Plaintiffs sought equitable relief against this action on behalf of themselves and other Negro employees.

In overruling a demurrer to the complaint, the Kansas Supreme Court held that the union, in exercising statutory bargaining powers, was functioning as an agency of the Federal Government. As such, it was restrained by the Fifth Amendment from denying to the minority group "the right to participate in determining the position to be taken by the union, as bargaining agent for all employees. . . ." ¹⁰ The union might, therefore, be enjoined from acting as bargaining representative for the craft while it denied such privileges to a minority within the craft.¹¹

The theory that a statutory bargaining representative acts as a Government agency and is subject to applicable constitutional controls, while suggested in some prior cases,¹² is here first given full effect. The best precedents for its use are not labor cases but the "white primary" cases,¹³ in which it has been held that a political party conducting primary elections under statutory authority acts as an agency of the state, in so far as it determines who is eligible to vote in the primary, and may not, under the Fourteenth and Fifteenth Amendments, discriminate against voters because of race. Any judgment as to whether this Constitutional doctrine should have been extended for the protection of racial minorities from labor union

9. BROTHERHOOD RAILWAY CARMEN OF AMERICA, SUBORDINATE LODGE CONSTITUTION (1935) § 6, cl. (c). "On Railroads where the employment of colored persons has become a permanent institution, they shall be admitted to membership in separate lodges. Where these separate lodges of negroes are organized they shall be under the jurisdiction of and represented by the delegate of the nearest white local in any meeting of the Joint Protective Board, Federation or Convention where delegates may be seated."

10. 161 Kan. 459, 169 P. (2d) 831, 839 (1946).

11. The decision is not entirely clear on the extent of injunctive relief authorized but appears to go at least this far. Relief asked for by the plaintiffs included an order restraining the union from setting up a separate lodge for Negroes, from acting as bargaining agent until it had granted Negroes "equality of privileges and participation" in the affairs of the union, and from enforcing the provisions of the union constitution quoted *supra* note 9. See 161 Kan. 459, 169 P. (2d) 831, 836 (1946).

12. See *Steele v. Louisville & N. R. R.*, 323 U. S. 192, 202, and Mr. Justice Murphy concurring at 208-9 (1944); *James v. Marinship Corp.*, 25 Cal. (2d) 721, 731, 155 P. (2d) 329, 335 (1944); *cf. Williams v. Int. etc. of Boilermakers*, 27 Cal. (2d) 586, 592, 165 P. (2d) 903, 906 (1946); *Dodd, The Supreme Court and Organized Labor, 1941-1945* (1945) 58 HARV. L. REV. 1018, 1039.

13. *Smith v. Allwright*, 321 U. S. 649 (1944) [overruling *Grovey v. Townsend*, 295 U. S. 45 (1935)]; *Nixon v. Condon*, 286 U. S. 73 (1932); *cf. United States v. Classic*, 313 U. S. 299 (1941); *Nixon v. Herndon*, 273 U. S. 536 (1927).

discrimination must take into account the adequacy of other available remedies.

Under the common law of private associations, as applied to labor unions, the courts have been able to afford little relief from race discrimination.¹⁴ Although members of a union may be protected against oppression¹⁵ or arbitrary expulsion,¹⁶ non-members seeking admission have generally been

14. See generally Chafee, *The Internal Affairs of Associations Not for Profit* (1930) 43 HARV. L. REV. 993; Newman, *The Closed Union and the Right to Work* (1943) 43 COL. L. REV. 42; Witmer, *Civil Liberties and the Trade Union* (1941) 50 YALE L. J. 621; Note (1941) 51 YALE L. J. 331; Comment (1936) 45 YALE L. J. 1248.

15. *Piercy v. Louisville & N. Ry.*, 198 Ky. 477, 248 S. W. 1042 (1923) (seniority rights of member protected against violation by company at request of union); *Cameron v. International Alliance*, 118 N. J. Eq. 11, 176 Atl. 692 (1935) (enjoined classification of members as juniors and seniors for purpose of denying to juniors participation in union policy formulation); *Collins v. International Alliance*, 119 N. J. Eq. 230, 182 Atl. 37 (Ch. 1935) (juniors protected from being compelled to do work of seniors); *Walsche v. Sherlock*, 110 N. J. Eq. 223, 159 Atl. 661 (Ch. 1932) (union officers restrained from using card index system as means of discriminating against certain members).

16. Courts have restrained expulsion or ordered reinstatement of a member where the union did not comply with its own by-laws or constitution in expelling him, or failed to use a procedure satisfying "natural justice." *Burke v. Monumental Division*, 273 Fed. 707 (D. Md. 1919); *Smetherham v. Laundry Workers' Union*, 44 Cal. App. (2d) 131, 111 P. (2d) 948 (3d Dist. 1941); *Edrington v. Hall*, 168 Ga. 484, 148 S. E. 403 (1929) (on theory that such action violated a property right); *Abdon v. Wallace*, 95 Ind. App. 604, 165 N. E. 68 (1929); *Fleming v. Motion Picture Machine Operators etc.*, 124 N. J. Eq. 269, 1 A. (2d) 386 (1938); *Lo Bianco v. Cushing*, 117 N. J. Eq. 593, 177 Atl. 102 (Ch. 1935), *aff'd per curiam*, 119 N. J. Eq. 377, 182 Atl. 874 (1936) (on theory that such action violated a property right); *Reilly v. Hogan*, 32 N. Y. S. (2d) 864 (Sup. Ct. 1942), *aff'd*, 264 App. Div. 855, 36 N. Y. S. (2d) 423 (1st Dep't 1942); *Bricklayers' P. & S. Union v. Bowen*, 183 N. Y. Supp. 855 (Sup. Ct. 1920), *aff'd*, 198 App. Div. 967, 189 N. Y. Supp. 938 (4th Dep't 1921); *Robinson v. Dahm*, 94 Misc. 729, 159 N. Y. Supp. 1053 (Sup. Ct. 1916) (theory that the union constitution and by-laws constituted a contract with the members required to be complied with in carrying out an expulsion); *cf.* *Most Worshipful United Grand Lodge of F. & A. M. v. Lee*, 128 Md. 42, 96 Atl. 872 (1916); *Krause v. Sander*, 66 Misc. 601, 122 N. Y. Supp. 54 (Sup. Ct. 1910), *aff'd mem.*, 143 App. Div. 941, 127 N. Y. Supp. 1128 (2d Dep't 1911) (contract theory, plaintiff lost through failure to establish non-compliance with union rules). Some courts have overridden union rules which interfered with the civil rights of a member. *Sweetman v. Barrows*, 263 Mass. 349, 161 N. E. 272 (1928); *Spayd v. Ringing Rock Lodge*, 270 Pa. 67, 113 Atl. 70 (1921); *Thompson v. Grand Int. Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S. W. 834 (1905). Expulsions have been restrained when carried out in "bad faith." *Edrington v. Hall*, 168 Ga. 484, 148 S. E. 403 (1929); *Abdon v. Wallace*, 95 Ind. App. 604, 165 N. E. 68 (1929).

Under similar circumstances, damages have been awarded for loss of employment through wrongful expulsion. *Smetherham v. Laundry Workers' Union*, 44 Cal. App. (2d) 131, 111 P. (2d) 948 (3d Dist. 1941); *Mullen v. Seegers*, 220 Mo. App. 847, 294 S. W. 745 (1927); *Fleming v. Moving Picture Operators etc.*, 124 N. J. Eq. 269, 1 A. (2d) 386 (1938); *Reilly v. Hogan*, 32 N. Y. S. (2d) 864 (Sup. Ct. 1942), *aff'd*, 264 App. Div. 855, 36 N. Y. S. (2d) 423 (1st Dep't 1942); *Cheetham v. Local No. 222, United Garment Workers of America*, 3 Prentice-Hall 1946 Labor Law Serv. ¶ 47546 (Pa. C. P. 1945); *International Printing Pressmen Union v. Smith*, 3 Prentice-Hall 1946 Labor Law Serv. ¶ 47604 (Tex. Sup. Ct. 1946); *McCantz v. Brotherhood of Painters, Decorators, etc.*, 13 S. W. (2d) 902 (Tex. Civ. App. 1929).

denied judicial aid on the ground that private associations have wide freedom to select members as they choose.¹⁷ Where unions have obtained closed shop agreements, some courts have held them liable in damages¹⁸ for, or have enjoined them¹⁹ from, procuring the dismissal of employees for non-membership in the union, when membership was not open to them on reasonable terms. But in the absence of statute, judicial protection against dismissal from employment has not generally gone so far as to require the union to extend membership to "unacceptable" employees.

However, the California Supreme Court has gone further. Holding in a series of cases that the closed shop combined with the closed union is incompatible with public policy,²⁰ it has enjoined employers and unions from enforcing closed shop contracts so long as the union refused to grant membership on equal terms to Negroes. With the possible exception of New Jersey,²¹ no other state seems to have reached this position without the aid of statutes.

Statutes have been enacted in a few states for the prevention of discrimi-

17. *Harmon v. United Mine Workers*, 166 Ark. 255, 266 S. W. 84 (1924); *Greenwood v. Building Trades Council of Sacramento*, 71 Cal. App. 159, 233 Pac. 823 (3d Dist. 1925); *Maguire v. Buckley*, 301 Mass. 355, 17 N. E. (2d) 170 (1938); *Minasian v. Osborne*, 210 Mass. 250, 96 N. E. 1036 (1911); *Muller v. Bricklayers, Masons & Plasterers International Union*, 6 N. J. Misc. 226 (Sup. Ct. 1928); *O'Brien v. Musical Mutual Protective Union*, 64 N. J. Eq. 525, 54 Atl. 150 (1903); *Mayer v. Journeymen Stonecutters' Association*, 47 N. J. Eq. 519, 20 Atl. 492 (Ch. 1890); *Shein v. Rose*, 12 N. Y. S. (2d) 87 (Sup. Ct. 1939); *Miller v. Ruehl*, 166 Misc. 479, 2 N. Y. S. (2d) 394 (Sup. Ct. 1938); *Simons v. Berry*, 210 App. Div. 90, 205 N. Y. Supp. 442 (1st Dep't 1924). Some courts have refused to interfere even though the union had a closed shop. *Walter v. McCarvel*, 309 Mass. 260, 34 N. E. (2d) 677 (1941) (in absence of showing that the union also had a monopoly of employment in locality); *Murphy v. Higgins*, 12 N. Y. S. (2d) 913 (Sup. Ct. 1939), *aff'd*, 260 App. Div. 854, 23 N. Y. S. (2d) 552 (1st Dep't 1940).

18. *Lucke v. Clothing Cutters' Assembly*, 77 Md. 396, 26 Atl. 505 (1893); see RESTATEMENT, TORTS (1939) § 810.

19. *Wilson v. Newspaper and Mail Deliverers' Union*, 123 N. J. Eq. 347, 197 Atl. 720 (Ch. 1938); *Wills v. Restaurant Employees*, 26 Ohio N. P. 435 (1927); *Schwab v. Moving Picture Machine Operators Local*, 165 Or. 602, 109 P. (2d) 600 (1941); *Dorrington v. Manning*, 135 Pa. Super. 194, 4 A. (2d) 886 (1939). *Contra*: *Murphy v. Higgins*, 12 N. Y. S. (2d) 913 (Sup. Ct. 1939), *aff'd*, 260 App. Div. 854, 23 N. Y. S. (2d) 552 (1st Dep't 1940); *Miller v. Ruehl*, 166 Misc. 479, 2 N. Y. S. (2d) 394 (Sup. Ct. 1938). The New York statutes, *infra* note 26, were subsequently enacted.

20. *Williams v. International Brotherhood of Boilermakers*, 27 Cal. (2d) 586, 165 P. (2d) 903 (1946); *Thompson v. Moore Drydock Co.*, 27 Cal. (2d) 595, 165 P. (2d) 901 (1946); *James v. Marinship Corp.*, 25 Cal. (2d) 721, 155 P. (2d) 329 (1944); *cf. Bautista v. Jones*, 25 Cal. (2d) 746, 155 P. (2d) 343 (1944).

Five states have adopted constitutional amendments outlawing the closed shop: approved by voters in Nebraska, South Dakota and Arizona on Nov. 5, 1946. American Civil Liberties Union Bulletin No. 1256, Nov. 11, 1946. Florida and Arkansas had previously adopted the ban. FLORIDA CONST. DECLARATION OF RIGHTS, § 12; ARKANSAS CONST. AMEND. XXXIV.

21. See *Carroll v. Local No. 269 etc.*, 133 N. J. Eq. 144, 147, 31 A. (2d) 223, 225 (Ch. 1943). Massachusetts courts have refused to interfere on behalf of outsiders even where the

nation by unions.²² Some of these authorize the state labor board to terminate an all-union agreement where the union refuses to grant membership to any employee.²³ Others withdraw the protection of state labor laws²⁴ or forbid a union which discriminates against minorities to act as bargaining representative.²⁵ More direct in approach are the fair employment practice laws,²⁶ which make discrimination on account of race, creed or color punishable as a misdemeanor. The Supreme Court has upheld the constitutionality of such legislation.²⁷

Neither the Railway Labor Act nor the National Labor Relations Act contain provisions aimed at race discrimination. However, in carrying out their function of designating appropriate units for bargaining purposes, both the NLRB and the National Mediation Board have consistently ruled against setting up separate units for racial minorities.²⁸ In some instances this has induced unions, which formerly discriminated, to admit Negroes in order to muster necessary votes for designation as bargaining representative,²⁹ but it affords no protection where the white union is strong enough to win without colored support. The NLRB has held, in closed shop situations, that a union is not entitled to procure the discharge of employees dis-

union had a closed shop unless the union were also shown to have a monopoly of employment in the locality. *Walter v. McCarvel*, 309 Mass. 260, 34 N. E. (2d) 677 (1941); see *Shinsky v. O'Neil*, 232 Mass. 99, 104, 121 N. E. 790, 792 (1919). New Jersey and Massachusetts have recently enacted FEPC type legislation. See *infra* note 26.

22. See generally Dublirer, *Legislation Outlawing Racial Discrimination in Employment* (1945) 5 LAW. GUILD REV. 101. For a survey of legislative activity in various states see (1945) 15 L. R. R. 769; (1945) 16 L. R. R. 6, 34, 88, 127, 247, 280, 327, 757; (1946) 17 L. R. R. 811, 887, 924, 1096, 1142, 1217.

23. WIS. STAT. (1945) § 111.06 (1) (c); PA. STAT. ANN. (Purdon, 1941) tit. 43, § 211.6 (1) (c).

24. PA. STAT. ANN. (Purdon, Supp. 1946) tit. 43, § 211.3 (f).

25. KAN. GEN. STAT. (Corrick, 1945) § 44-801; cf. NEB. REV. STAT. (1943) § 48-214.

26. MASS. LAWS ANN. (Supp. 1946) c. 151B, §§ 4, 8; 18 N. J. STAT. ANN. (Supp. 1946) §§ 18:25-6, 18:25-12; N. Y. EXECUTIVE LAW §§ 131, 134; N. Y. CIVIL RIGHTS LAW §§ 41, 43. Two states have enacted measures of the "educational type," setting up administrative bodies with power only to make studies and recommendations. 8 IND. STAT. ANN. (Burns, Supp. 1945) §§ 40-2301-6; WIS. STAT. (1945) §§ 111.31-7. See note 22 *supra*.

27. *Railway Mail Ass'n v. Corsi*, 326 U. S. 88 (1945).

28. See NATIONAL MEDIATION BOARD, *THE RAILWAY LABOR ACT AND THE NATIONAL MEDIATION BOARD* (1940) 17; 8 NLRB ANN. REP. (1943) 57; *Matter of Columbian Iron Works*, 52 N.L.R.B. 370, 372, 374 (1943); *Matter of U. S. Bedding Co.*, 52 N.L.R.B. 382, 388 (1943); *Matter of Tampa Florida Brewery, Inc.*, 42 N.L.R.B. 642, 645-6 (1942); *Matter of Aetna Iron & Steel Co.*, 35 N.L.R.B. 136, 138 (1941).

29. See Brief for the National Association for the Advancement of Colored People as *amicus curiae*, p. 14 n. 22, *Tunstall v. Brotherhood*, 323 U. S. 210 (1944); *Matter of Ozan Lumber Co.*, 42 N.L.R.B. 1073 (1942); *Matter of American Cyanamid Co.*, 37 N.L.R.B. 578, 585-6 (1941); *Matter of Southern Cotton Oil Co.*, 26 N.L.R.B. 177, 180, 183 (1940); *Matter of Bradley Lumber Co.*, 34 N.L.R.B. 610 (1941) *passim*; *Matter of Tex-O-Kan Flour Mills Co.*, 26 N.L.R.B. 765, 787-90 (1940); *Matter of Memphis Furniture Mfg. Co.*, 3 N.L.R.B. 26, 31 (1937).

criminatorily denied membership.³⁰ Having no power to force the union to admit such employees, the Board has ordered the employer to reinstate them; its power to do so has been sustained.³¹ The Board has recently further announced that it will scrutinize the activities of unions which do not open their membership to all employees in the unit and will deny or rescind certification of bargaining representatives which discriminate against employees in the unit in regard to substantive conditions of employment on the basis of race, creed or color.³²

In adopting this position, the NLRB has relied in part³³ on the Supreme Court decisions in the cases of *Steele v. Louisville & Nashville R. R.*³⁴ and *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*,³⁵ which both held that a union designated as bargaining representative, under provisions of the Railway Labor Act similar to those in the NLRA, was under an implied statutory duty to represent in good faith and without hostile discrimination a non-union Negro minority within the craft. Although the Court might have carried this implied statutory duty further to require the bargaining representative to open its membership to Negroes or at least to give them voting rights on questions of union bargaining policy and election of union officials to do the bargaining, it seems to have rejected specifically

30. Matter of Wallace Corporation, 50 N.L.R.B. 138 (1943), *aff'd*, 323 U. S. 248 (1944); Matter of Rutland Court Owners, Inc., 44 N.L.R.B. 587 (1942), 46 N.L.R.B. 1040 (1943); Matter of Monsieur Henri Wines, Ltd., 44 N.L.R.B. 1310 (1942); see Matter of Larus & Brother Co., Inc., 62 N.L.R.B. 1075, 1082 (1945).

31. Wallace Corporation v. Labor Board, 323 U. S. 248 (1944)

32. 10 N.L.R.B. ANN. REP. (1946) 17-8; Matter of Larus & Brother Co., 62 N.L.R.B. 1075 (1945); see Matter of Atlanta Oak Flooring Co., 62 N.L.R.B. 973, 975-6 (1945); Matter of General Motors Corp., 62 N.L.R.B. 427, 431 (1945); Matter of Southwestern Portland Cement Co., 61 N.L.R.B. 1217, 1219 (1945); Matter of Carter Manufacturing Co., 59 N.L.R.B. 804, 805-6 (1944); Matter of Bethlehem-Alameda Shipyard, 53 N.L.R.B. 999, 1017 (1943).

The de-certification power, however, is a weapon of limited effectiveness in combatting discrimination. The Board may thereby remove the sanction of the N.L.R.A. compelling the employer to bargain with the union; but if the union has a majority of the employees, and the employer is willing to bargain or the union is sufficiently powerful to compel the employer to bargain, the Board would apparently be without power to compel the employer to discontinue the relationship. See Cushman, *The Duration of Certifications by the N.L.R.B. and the Doctrine of Administrative Stability* (1946) 45 MICH. L. REV. 1, 37. Moreover, doubt exists concerning the statutory power of the Board thus indirectly to police the membership policies of unions. *Id.* at 33-7; Murdock, *Some Aspects of Employee Democracy under the Wagner Act* (1946) 32 CORN. L. Q. 73, 90, 97 (advocating amendment of the Act to give the Board direct power to assure democracy in unions). And see Mr. Justice Jackson dissenting (with Chief Justice Stone and Justices Roberts and Frankfurter) in *Wallace Corp. v. Labor Board*, 323 U. S. 248, 268-9 (1944).

33. Also *Wallace Corp. v. Labor Board*, 323 U. S. 248 (1944) (affirming power of board to order employer to rehire employee discriminatorily denied membership in union having a closed shop); see *Hunt v. Crumboch*, 325 U. S. 821, 826-7 (1945).

34. 323 U. S. 192 (1944).

35. 323 U. S. 210 (1944).

such an extension of the statute.³⁶ The doctrine of the *Steele* and *Tunstall* cases is inadequate to protect against any but the most obviously discriminatory practices. Without union membership the employee can only enforce this right to be fairly represented through court action or petition to an administrative body. Without membership and access to information about union bargaining policy, the employee may frequently be without means of knowing when he has been discriminated against.³⁷

While the aggressive policy of the NLRB affords some additional implementation to the fair representation doctrine of the *Steele* and *Tunstall* cases, and has met with some success,³⁸ the Board is limited by lack of authority directly to police the membership policies of certified unions. The National Mediation Board, on the other hand, seems to have undertaken no similar function in the administration of the Railway Labor Act,³⁹ with the result that the railway unions have not been subjected even to this much administrative restraint. They continue to comprise a large group engaging in race discrimination.⁴⁰

It therefore appears that except for statutes in a few states existing law is inadequate to assure racial minorities a right to take part in union collective bargaining activities. While it may be that the enunciation of basic policy for the government of labor unions should, in the present formative period, be left largely to Congress and the legislatures,⁴¹ *Bells v. Easley* has demonstrated that a doctrine is readily available upon which courts may base constitutional sanctions to assure minority participation where unions exercise statutory bargaining powers. The argument for imposing such sanctions is strengthened in cases where the statutory representative is held to be the sole bargaining representative, cutting off the right of the excluded minority to bargain for itself. If adequate protective legislation fails to materialize, other courts may well adopt the theory of *Bells v. Easley*.

36. See *Steele v. Louisville & N. R. R.*, 323 U. S. 192, 204 (1944).

37. See *The Elimination of Negro Firemen on American Railways etc.* (1944) 4 LAW. GUILD REV. No. 2, p. 32, 35.

38. Compare cases cited *supra* notes 30, 32; see Brief for the National Association for the Advancement of Colored People as *amicus curiae* pp. 12-4, *Tunstall v. Brotherhood*, 323 U. S. 210 (1944).

39. See NATIONAL MEDIATION BOARD, ELEVENTH ANNUAL REPORT (1946) 3 (discussing the *Steele* and *Tunstall* cases but announcing no Board policy based thereon; *The Elimination of Negro Firemen on American Railways etc.* (1944) 4 LAW. GUILD REV. No. 2, p. 32.

40. See sources cited *supra* note 1.

41. See GREGORY, LABOR AND THE LAW (1946) 334; Gregory, *Something Has to Be Done* (1946) 34 FORTUNE No. 5, pp. 132, 133, 267.

RECEIVERSHIP AND OTHER EQUITABLE REMEDIES TO COMPEL RESUMPTION OF OPERATIONS BY STRIKEBOUND INTERSTATE RAILROADS*

BECAUSE the shut-down of an interstate railroad deprives the public of essential transportation,¹ various federal statutes have sought to regulate abandonment of railroad operations by reason of the owner's caprice² or insolvency,³ and one objective of the federal Railway Labor Act⁴ is to reduce the frequency of strike-born interruption of operations. However, Congress has not undertaken to prohibit strikes on railroads, nor has it specifically authorized judicial process effective to compel settlement of strikes or the resumption of service.

Nevertheless, in *Farmers Grain Co. v. Toledo, Peoria, & Western Railroad*,⁵ a federal district court,⁶ upon petition of nineteen shippers⁷ almost com-

* *Farmers Grain Co. v. Toledo, Peoria & Western R. R.*, 158 F. (2d) 109 (C. C. A. 7th, 1946), *rev'g* 66 F. Supp. 845 (S. D. Ill. 1946), *certiorari granted*, (1947) 15 U. S. L. WEEK 3365. The district court opinion was noted in (1946) 46 COL. L. REV. 1026. A circuit court opinion, dated Sept. 4, 1946, and later withdrawn, was noted in (1946) 59 HARV. L. REV. 1319.

Although the instant Note deals only with interstate railroads, certain conclusions may be applicable to other industries subject to federal labor laws, particularly the air transport industry, which is subject to most of the provisions of the Railway Labor Act, 49 STAT. 1189 (1936), 45 U. S. C. § 181 (1940). No attempt is made in this Note to discuss the effectiveness of equitable proceedings when the plaintiff is a government or government agency.

1. See N. Y. Times, May 24, 1946, p. 1, col. 8, and *id.* May 25, 1946, p. 1, col. 4 and 8 (national railroad strike), and see *The Fortune Survey*, Fortune, Nov. 1946, p. 16.

2. See § 1 (18) Interstate Commerce Act, 41 STAT. 477 (1920), 49 U. S. C. § 1 (18) (1940) (hereafter cited by U. S. C. section number only.)

3. See § 77 of National Bankruptcy Act, 49 STAT. 911 (1935), as amended by 49 STAT. 1969 (1936) and 53 STAT. 1406 (1939), 11 U. S. C. § 205 (1940).

4. 44 STAT. 577 (1926), as amended by 48 STAT. 926 (1934), 48 STAT. 1185 (1934), 49 STAT. 1921 (1936) and 54 STAT. 785 (1940), 45 U. S. C. §§ 151-63 (1940) (hereafter cited by U. S. C. section number only.)

5. 158 F. (2d) 109 (C. C. A. 7th, 1946) *rev'g* 66 F. Supp. 845 (S. D. Ill. 1946). The circuit court issued an opinion on Sept. 4, 1946, but after Petitions for Rehearing were filed withdrew its opinion and issued a new opinion on Nov. 20, 1946. Unless otherwise indicated, this Note deals only with the November opinion.

6. The district court held that jurisdiction of the subject matter could be based upon the Interstate Commerce Act, the Railway Labor Act and the franchise granted the defendant railroad by the Interstate Commerce Commission, 66 F. Supp. 845, 854, 856-7 (S. D. Ill. 1946). The circuit court sustained this conclusion. 158 F. (2d) 109, 118 (C. C. A. 7th, 1946).

7. The plaintiffs tried unsuccessfully to obtain administrative relief from the Interstate Commerce Commission, 66 F. Supp. 845, 854 (S. D. Ill. 1946). Apparently, no attempt was made to secure commandeering and operation of the railroad by the United States Government, which would have been possible as a war measure under Section 9 of the Selective Training and Service Act of 1940, 54 STAT. 892, 50 U. S. C. App. § 309 (1940), as amended by § 3 of the War Labor Disputes Act, 57 STAT. 164 (1943), 50 U. S. C. App. § 1503 (Supp. 1946) (terminated by Presidential Proclamation on Dec. 31, 1946; see N. Y.

pletely dependent upon the strikebound defendant railroad for rail service,⁸ appointed a receiver to take over and operate the road, and enjoined the railroad management and striking unions from interfering with the receiver.⁹ This relief was based upon findings that the railroad's illegal and inequitable labor policy was the prime cause of the strike, and that the resultant cessation of operations violated the railroad's common law and statutory duty to operate. The Seventh Circuit Court of Appeals held that the receivership was an improper remedy¹⁰ and, in its stead, ordered the issuance of an injunction directing the railroad to resume operations. Rejecting the lower court's finding as to the cause of the strike, the circuit court also ordered issuance of an injunction against interference with operations by the striking union or anyone else.¹¹

Both opinions were colored by the long history of bitter and often violent labor-management conflict revealed by the case.¹² A substantial number of the employees struck in December, 1941,¹³ and returned to work only when the Office of Defense Transportation took over the railroad three months later. On October 1, 1945, when the ODT relinquished control, nearly all

Times, Jan. 1, 1947, p. 22, col. 1); and a provision in an Army Appropriation Act of 1916, 39 STAT. 645 (1916), 10 U. S. C. § 1361 (1940). Since the railroad had just been returned to private management, plaintiffs may have believed that the Government would be unwilling to take over operation again.

8. The defendant railroad transports freight from Effner, Indiana, through Illinois to Keokuk, Iowa; much of its freight is interchanged with connecting railroads. 66 F. Supp. 845, 846 (S. D. Ill. 1946).

9. In a few previous cases, private parties deprived of goods or services by a strike have obtained equitable relief in the form of an injunction, either to compel the company to resume operations [Stephens v. Ohio State Telephone Co., 240 Fed. 759 (N. D. Ohio 1917)] or to prevent striking employees from interfering with operations. See FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1930) 14, and cases there cited. The instant case appears to be the first in which a receivership was sought or obtained.

10. Upon appeal, the railroad had secured a supersedeas, and the receiver therefore never assumed control of the railroad. Communication to the *YALE LAW JOURNAL* from G. P. McNear, Jr., President, Toledo, P. & W. R. R., Nov. 20, 1946.

11. Both injunctions were issued by the district court on Dec. 5, 1946, and as subsequently amended are still in effect. Communication to the *YALE LAW JOURNAL* from G. P. McNear, Jr., President, Toledo, P. & W. R. R., Jan. 15, 1947.

In the September opinion, the circuit court had ordered an injunction against union violence, and indicated that a mandatory injunction to operate would have been a permissible remedy.

12. An elaborate account of the factual background appears in the district court opinion, 66 F. Supp. 845, 849-54 (S. D. Ill. 1946). Two strikers were slain on Feb. 6, 1946 in a clash between pickets and strikebreakers, and the shotgun slaying of G. P. McNear, Jr., President of the Railroad, on Mar. 10, 1947, may have been connected with the strike. See N. Y. Times, Mar. 12, 1947, p. 1, col. 2.

13. During the 1941-1942 strike the railroad attempted to secure an injunction against violence by union employees. The Supreme Court ruled that the railroad, by refusing to arbitrate, had failed to comply with § 8 of the Norris-La Guardia Act, 47 STAT. 72 (1932), 29 U. S. C. § 108 (1940) (hereafter cited by U. S. C. section number only). *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. R.*, 321 U. S. 50 (1944).

employees struck. This strike, which resulted in complete cessation of operations and which has been characterized by bloodshed and property damage, occurred after the railroad rejected a union request for a conference to discuss wages and working conditions, and after union officials had turned down proposals made by the railroad management.¹⁴ Negotiation and mediation have as yet failed to produce agreement, although partial operations have recently been resumed.¹⁵

The equitable remedies available in a suit brought by a private party to compel settlement of an interstate railroad strike or to bring about a resumption of service are few in number and appear to be of limited effectiveness. If the strike is caused or prolonged by the railroad's failure to bargain with its employees as required by the Railway Labor Act,¹⁶ the court could probably issue an injunction ordering compliance with the Act.¹⁷ Although the Act is silent as to how, and at whose request, the collective bargaining provisions may be enforced, the Supreme Court has sustained an injunction sought by a union to compel a carrier to bargain.¹⁸ A private party deprived of transportation by a railroad strike would seem to have sufficient interest to support a petition for a similar injunction.¹⁹

If, however, the union refuses to engage in collective bargaining, the injunctive remedy appears to be unavailable. While the Railway Labor Act requires all parties to a dispute to "exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . .,"²⁰ this provi-

14. The principal issues involved are seniority provisions, so-called "feather-bed rules," and the rehiring of employees guilty of violence against the railroad. 66 F. Supp. 845, 854 (S. D. Ill. 1946); see *Business Week*, June 15, 1946, p. 84.

15. Communications to the *YALE LAW JOURNAL* from G. P. McNear, Jr., President, Toledo, P. & W. R. R., Nov. 20, 1946, and Jan. 15, 1947. See also *N. Y. Times*, Mar. 12, 1947, p. 1, col. 2.

16. Section 152, ¶¶ 1, 6, and 9 of the Act require the employer to engage in collective bargaining. In the *Peoria* case, the district court found that the railroad had failed to carry out its duty to bargain, but the circuit court reversed this finding. 66 F. Supp. 845, 855 (S. D. Ill. 1946); 158 F. (2d) 109, 116-7 (C. C. A. 7th, 1946). It should be kept in mind that railroad employers are expressly exempted from the National Labor Relations Act. 49 STAT. 450 (1935), 29 U. S. C. § 152 (2) (1940).

17. It would seem that such an injunction should precede any more stringent remedy, e.g., an injunction directing the railroad to operate or the appointment of a receiver, discussed *infra* pp. 741-4. Existing Congressional policy appears to favor settlement of disputes by bargaining, if possible. See *infra* p. 743. Moreover, bargaining may settle basic issues, while resumption of operations pursuant to court order might only postpone the day of reckoning. Similarly, the attempt to resume operations under such an order might intensify strife, while an injunction requiring bargaining may lead strikers to return to work while bargaining was in progress.

18. *Virginian Ry. v. System Federation* No. 40, 300 U. S. 515 (1937).

19. Compare *Louisville & N. R. R. v. F. W. Cook Brewing Co.*, 223 U. S. 70 (1912). And see § 1 (20) of the Interstate Commerce Act, and (1946) 46 COL. L. REV. 1026, 1027 n. 9.

20. Sec. 152, ¶ 1.

sion has been held to impose on employees no legally enforceable duty to bargain.²¹

Moreover, since railroad strikes are almost invariably preceded by collective bargaining,²² it is seldom that a court would be able to attempt settlement of a dispute by enforcing the statutory duty to bargain.²³

If collective bargaining is pursued but fails to produce settlement of the strike, a mandatory injunction directing the railroad to resume operations would seem proper. Such an injunction could be predicated on the railroad's duty to operate, as prescribed by the Interstate Commerce Act²⁴ and the common law.²⁵ While it has been held that violence during a strike excuses a railroad from liability in damages for failure to provide transportation,²⁶ mere existence of a strike may not relieve the railroad from the obligation to maintain service.²⁷ It is doubtful, however, that the injunction to operate could be construed so as to compel the railroad to accede to

21. *Malone v. Gardner*, 62 F. (2d) 15 (C. C. A. 4th, 1932). But *cf.* *Virginian Ry. v. System Federation No. 40*, 300 U. S. 515, 544-8 (1937).

22. See, *e.g.*, *N. Y. Times*, May 26, 1946, § 4, p. 1, col. 1 (national railroad strike).

23. Although the district court in the *Peoria* case found that the railroad, and to a lesser degree the unions, had failed to bargain collectively, it apparently did not consider the issuance of an injunction ordering collective bargaining. 66 F. Supp. 845, 855 (S. D. Ill. 1946). This may have been due to a belief that the bitterness between the parties made negotiations useless. The circuit court found that both parties did engage in collective bargaining, and thus was not faced with this issue. 158 F. (2d) 109, 116-7 (C. C. A. 7th, 1946).

24. Section 1 (4) of the Act provides that "It shall be the duty of every common carrier . . . to provide and furnish transportation upon reasonable request therefor. . . ." Section 1 (18) prohibits abandonment of a railroad line unless a certificate of public convenience and necessity is first obtained from the Interstate Commerce Commission. Section 1 (20) permits enjoining such abandonment at the request of, *inter alia*, "any party in interest."

25. See, *e.g.*, *McCran v. Public Service Ry.*, 95 N. J. Eq. 22, 122 Atl. 205 (Ch. 1923); *People v. New York C. & H. R. R.*, 28 Hun. 543 (N. Y. 1883); *Blackstock v. New York & E. R. R.*, 20 N. Y. 48 (1859); *Loader v. Brooklyn Heights R. R.*, 14 N. Y. Misc. 208, 35 N. Y. Supp. 996 (Sup. Ct. 1895).

26. *E.g.*, *Gage v. Arkansas C. R. R.*, 160 Ark. 402, 254 S. W. 665 (1923). In the *Peoria* case, the district court found that the amount of violence was insufficient to excuse the failure of the railroad to operate; the circuit court came to the opposite conclusion. 66 F. Supp. 845, 852-3 (S. D. Ill. 1946); 158 F. (2d) 109, 117-8 (C. C. A. 7th, 1946). If no distinction is made between the "duty to operate" in the context of reparations for failure to provide transportation, and "duty to operate" where the issue is restoration of service, simple syllogisms lead to the proposition that the mandatory injunction to operate is an appropriate remedy in case of a strike without violence, but has no legal basis after the first fists fly. It seems more realistic to treat violence as a separate issue, remediable by injunction against violence or against interference with operations, insofar as an action to restore service is concerned.

27. It has been stated that a strike-caused cessation of operations amounts to abandonment under Sec. 1 (18) of the Interstate Commerce Act. *Toledo, P. & W. R. R. v. Brotherhood of Railroad Trainmen*, 132 F. (2d) 265, 269 (C. C. A. 7th, 1942), *rev'd on other grounds*, 321 U. S. 50 (1944). *Cf.* *Stephens v. Ohio State Telephone Co.*, 240 Fed. 759 (N. D. Ohio 1917) [Section 1 (4) of the Interstate Commerce Act]. And see cases cited in note 25, *supra*.

the demands of the strikers,²⁸ or to employ strikebreakers²⁹ without regard to cost,³⁰ in order to restore service. The circuit court in the *Peoria* case indicates that a reasonable effort by the railroad to resume operations will meet the requirements of the injunction.³¹ Nor could the court, under the guise of implementing the mandate to operate, decide the issues in dispute, since such action would amount to compulsory arbitration and contravene the Railway Labor Act.³² Accordingly, the effectiveness of an injunction to operate hinges on the fortuity of whether the railroad can find, or train, sufficient qualified replacements for the striking employees,³³ willing to incur the title of "scab" without demanding prohibitive compensation. Moreover, renewal of service pursuant to such an injunction might prove futile if employees of connecting railroads refused to handle cars interchanged with the strikebound road.³⁴

If neither collective bargaining nor the injunction to operate is successful, the appointment of a receiver for the railroad is a possible remedy. On the doctrinal level, receivership may be rejected as not ancillary to other relief sought.³⁵ However, if a mandatory injunction to operate is permissible, it

28. Although the state cases of *McCran v. Public Service Ry.*, 95 N. J. Eq. 22, 28-30, 122 Atl. 205, 208-09 (Ch. 1923) and *Loader v. Brooklyn Heights R. R.*, 14 N. Y. Misc. 208, 209-10, 35 N. Y. Supp. 996, 997 (Sup. Ct. 1895) appear to give some support to such a result, it seems clear that this interpretation of the injunction would contravene present Congressional policy to permit economic warfare as a means of settling railroad labor disputes. See *infra* p. 743.

29. The Byrnes Anti-Strikebreaker Act, 49 STAT. 1899 (1936), as amended by 52 STAT. 1242 (1938), 18 U. S. C. § 407(a) (1940) does not, apparently, prevent the peaceful replacement of striking employees with new employees. See SEN. REP. NO. 821, 75th Cong., 1st Sess. (1937) 1-2; cf. *NLRB v. Mackay Radio and Telegraph Co.*, 304 U. S. 333, 345-6 (1938). And see ROSENFARB, *THE NATIONAL LABOR POLICY AND HOW IT WORKS* (1940) 97-8, 541-2.

30. But see cases cited in note 28, *supra*.

31. 158 F. (2d) 109, 119 (C. C. A. 7th, 1946).

32. See note 40 *infra* and related text. But see the dissent in the September opinion of the circuit court in the *Peoria* case, which hinted that, under such an injunction, the court might itself adjudicate the labor-management dispute.

33. The district court in the *Peoria* case found that at least 90% of the available skilled railroad workers in the United States are union members, 66 F. Supp. 845, 853 (S. D. Ill. 1946). No information is available as to whether the *Peoria* line has recruited new employees in its attempt to comply with the mandatory injunction.

34. Embargoes against interchange of cars with the *Peoria* road were withdrawn by connecting carriers after the November opinion of the circuit court, but employees of such carriers have in a number of instances refused to run cars across picket lines established by striking *Peoria* employees. Communication to YALE LAW JOURNAL from Cassidy, Sloan & Crutcher, Plaintiff's Counsel, Dec. 24, 1946. Since refusal to work is not enjoined [§ 104 (a), Norris-LaGuardia Act], unionized trainmen on connecting carriers could probably not be prevented from imposing a secondary boycott by refusing to handle cars interchanged with the *Peoria* road. See GREGORY, *LABOR AND THE LAW* (1946) 194. To attempt to punish such conduct as violative of an injunction against interference with railroad operations [cf. *In re Lennon*, 166 U. S. 548 (1897)] would also appear to be proscribed by the Act.

35. *Farmers Grain Co. v. Toledo, P. & W. R. R.* 158 F. (2d) 109, 116 (C. C. A. 7th,

would seem that receivership could be sustained as an appropriate remedy where the injunction is inadequate.

Consideration of Congressional policy,³⁶ however, casts more serious doubt on the propriety of receivership. The wording and intent of the Railway Labor Act³⁷ apparently implies a right on the part of the railroad to engage in economic warfare as a method of settling disputes with its employees. Although the Act sets up elaborate machinery for the settlement of disputes by negotiation, mediation, voluntary arbitration and fact finding by an Emergency Board,³⁸ it leaves open the possibility that these procedures might fail to avert strikes.³⁹ By refusing to provide for compulsory arbitration⁴⁰ and by requiring of railroads only that they bargain with their employees and not that they reach an agreement with them,⁴¹ Congress has indicated, it would seem, an intention that economic warfare is to be the final arbiter of labor disputes, even though cessation of operations is a necessary consequence. While the receiver succeeds to all the rights of the railroad's private management, including the right to resist the demands of striking employees, his appointment substitutes the discretion and judgment of a court officer for that of private management, and, in effect, de-

1946) and cases there cited; *cf.* (1946) 46 COL. L. REV. 1026, 1028-9; (1946) 59 HARV. L. REV. 1319, 1321.

36. From the standpoint of judicial policy, miscellaneous arguments can be made indicating that the courts should eschew receivership in strike situations. It has been contended that such a receivership may involve the courts in complex managerial problems for an indefinite period; that a private party seeking relief has no direct financial interest in the conservation of corporate assets; that a receivership coerces the employer but not the employee; and that the court might be "embarrassed" or "uncomfortable" if the receiver failed to come to terms with the strikers. See (1946) 46 COL. L. REV. 1026, 1028-9; (1946) 59 HARV. L. REV. 1319, 1321. It might also be contended that, if the private management refuses to accept the terms agreed upon by the receiver and the employees, continuation of the receivership represents an indefinite suspension of the usual right to control one's own property. These arguments, however, seem of insufficient weight to counterbalance the public interest in regularity of railroad transportation.

37. For a concise history of federal railway labor legislation, see *General Committee v. Missouri-Kansas-Texas R. R.*, 320 U. S. 323, 328 n. 3 (1943) and materials there cited.

38. See §§ 152, 156 (negotiation); §§ 154-5 (mediation); §§ 157-9 (voluntary arbitration); and § 160 (fact-finding by Presidential Emergency Board).

39. Although it was hoped that the machinery set up by the Act would succeed in preventing strikes, the possibility that it would not be successful was recognized. SEN. REP. NO. 222, 69th Cong., 1st Sess. (1926) 4, 6.

40. Sec. 157, ¶ 1, provides that a dispute "may" be submitted to voluntary arbitration, and adds "the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms . . ." of the Act or otherwise. See also SEN. REP. NO. 222, 69th Cong., 1st Sess. (1926) 3-4; SEN. REP. NO. 606, 69th Cong., 1st Sess. (1926) 3-4; and H. R. REP. NO. 328, 69th Cong., 1st Sess. (1926) 4. But *cf.* § 153, which empowers the Railroad Adjustment Board to settle disputes arising out of grievances and the interpretation of existing agreements.

41. See § 152, ¶¶ 1, 5, 9. And see *Virginian Ry. v. System Federation No. 40*, 300 U. S. 515, 548 (1937).

prives the latter of the power to exercise its statutory right.⁴² Accordingly, the appointment of a receiver, unlike the issuance of an injunction to operate, may be attacked as incompatible with Congressional policy.

It is at least arguable, however, that, in prescribing certain procedures under the Railway Labor Act for the settlement of disputes, Congress did not intend to proscribe the use of other methods of settlement, *e.g.*, the appointment of a receiver, where all other procedures have failed to restore service. But it seems more likely that a Congress which was plainly opposed to settlement by compulsory arbitration would have been equally opposed to settlement by seizure,⁴³ whether by executive or judiciary.⁴⁴ If this latter conclusion is correct, the appointment of a receiver would be in derogation of Congressional policy. While it cannot be denied that such a policy may result in great damage to persons deprived of rail service by a strike, changes in the law should be a matter for the Congress, not for the courts.⁴⁵

Moreover, if the injunction to operate did not succeed in restoring train service, a receiver would also fail unless he were able to come to terms with the striking employees. Recent decisions indicate that a receiver-employer has the same duties toward employees as an ordinary employer.⁴⁶ Hence, since his official capacity provides him no additional leverage for compelling strikers to return to work, settlement must depend upon his bargaining skill or his willingness to make concessions to striker demands.⁴⁷

Independent of the above-described remedies, although perhaps a necessary adjunct thereto, is the power of a court to enjoin labor violence which

42. It is also arguable that the private management does not have to accept any settlement reached between the receiver and the striking employees. But the freedom in such a choice seems largely theoretical, since a court would not restore the road to private management until the management could guarantee that operations would continue.

43. "The law (the Railway Labor Act) is particularly significant in that it reflects the attitude of the time for 'less government intervention.'" *TWENTIETH CENTURY FUND, LABOR AND THE GOVERNMENT* (1935) 184. Nor is it without significance that, even after the 1946 nation-wide railroad strike, there seems to be little sentiment in the present Congress for permitting seizure of strike-bound railroads.

44. Congress established specialized agencies to handle adjustment activities under the Railway Labor Act, and in § 159 of the Act specifically limited the adjustment roles of the federal courts to awarding judgments upon arbitration awards and setting aside such awards upon proof of fraud, corruption, etc. Accordingly, the courts should be cautious in extending their activities in the settlement of railroad labor disputes. *Cf.* *General Committee v. Missouri-Kansas-Texas R. R.*, 320 U. S. 323, 337 (1943). Congressional policy that the courts stay out of labor disputes has also been drawn from the Norris-LaGuardia Act. See (1946) 59 *HARV. L. REV.* 1319, 1321. However, the purpose of that Act was merely to limit the power to grant injunctions against labor. See GREGORY, *op. cit. supra* note 34, at 190-4; *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. R.*, 321 U. S. 50, 58 (1944).

45. See GREGORY, *op. cit. supra* note 34, at cc. X, XII; Mr. Justice Brandeis dissenting in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 488 (1921).

46. See (1946) 46 *COL. L. REV.* 1026, 1029 n. 23.

47. It appears that the receiver for the *Peoria* road would have come to an agreement with the unions. Communication to the *YALE LAW JOURNAL* from G. P. McNear, President,

interferes with railroad operations, if the requirements of the Norris-LaGuardia Act have been complied with.⁴⁸ Orders appointing a receiver commonly include an injunction against interference with his conduct of the enterprise, and the circuit court in the *Peoria* case directed that such an injunction accompany the mandatory injunction to operate.⁴⁹ Whether standing alone or as an ancillary remedy, the injunction against violence or interference encounters the same primary obstacle as other remedies—success depends on the availability of workers, new or old, previously deterred by fear of violence, to replace those strikers who remain adamant.⁵⁰

It is thus apparent that equitable proceedings probably will be of little utility in affording relief to private parties harmed by a strike on an interstate railroad. Accordingly, the problem of railroad strikes must be solved by other agencies than the courts as at present constituted and empowered. While the standard solution for problems of this kind is to suggest Congressional action,⁵¹ there is danger of overlooking the fact that legislation, unless it requires involuntary servitude, cannot keep an industry operating when a sizeable block of employees is sufficiently dissatisfied to be willing to strike. Perhaps a more fruitful approach is to be found in the application by both labor and management of the growing body of technical knowledge about the nature of human relations in modern industry.⁵² Coupled with a greater

Toledo, P. & W. R. R., Nov. 20, 1946. Similarly, when the ODT seized the Peoria road in 1942, an agreement with the strikers was speedily reached. When the ODT relinquished control on October 1, 1945, the railroad's management refused to adopt the terms of this agreement, and the strike was resumed. 66 F. Supp. 845, 851-2 (S. D. Ill. 1946).

48. See particularly §§ 104, 107-08, 113.

49. There is some doubt whether the *Peoria* injunction against interference fulfills the procedural requirements imposed by §§ 107 and 109 of the Norris-LaGuardia Act, and it is not certain that the railroad had complied with § 108. See 158 F. (2d) 109, 118-21 (C. C. A. 7th, 1946). Moreover, the district court on Jan. 10, 1947, amended the injunction to prohibit the "presence of persons at or near" points where the Peoria line interchanged cars with connecting carriers. This would appear to be a clear violation of § 104 (e) of the Act, which forbids the enjoining of peaceful picketing. The Supreme Court has granted certiorari to review the legality of this injunction. See (1947) 15 U. S. L. WEEK 3365.

It is not clear whether the circuit court in the *Peoria* case directed the injunction against interference to protect the mandatory injunction to operate, or as the relief requested by the railroad in its cross complaint. See 158 F. (2d) 109, 118-21 (C. C. A. 7th, 1946). As finally issued by the district court, the injunction against interference was ancillary to the mandatory injunction, the railroad having withdrawn its cross-complaint. Communication to the YALE LAW JOURNAL from Cassidy, Sloan & Crutcher, Plaintiff's Counsel, Dec. 24, 1946.

50. In the *Peoria* case, it is not known whether the injunctions issued by the district court in December, 1946 were responsible for the partial resumption of service at about that time, or whether resumption was due principally to the exhaustion of the strikers after 14 months on strike.

51. See (1946) 46 COL. L. REV. 1026, 1030, 59 HARV. L. REV. 1319, 1322.

52. See Drucker, *Why Men Strike* (Nov. 1946) 193 HARPERS 385; Drucker, *Citizenship in the Plant* (Dec. 1946) *id.* at 511; Drucker, *Can We Get Around the Roadblocks?* (Jan. 1947) 194 *id.* at 85.

sense of responsibility towards the public,⁵³ policies implementing such knowledge may succeed in eliminating costly strikes of the kind that led to the *Peoria* litigation.

DATE OF WAR INCEPTION AS DETERMINANT OF LIABILITY IN LIFE INSURANCE CONTRACTS*

DETERMINATION of the existence of a state of war at times becomes the key issue in contract interpretation. The question usually arises where it has not been in contemplation of the parties at the time of execution: where, for example, a party turns out to be an alien enemy,¹ or where performance would entail delivery of war material to a belligerent.² In some cases, however, the possibility of war is expressly foreseen and provided for;³ and, in a fraction of this group, the actual date of inception becomes the sole subject of controversy.⁴

Of such nature is the life insurance contract in the instant case.⁵ A life insurance policy issued to Captain Mervyn S. Bennion by the New York Life Insurance Company in 1925, provided for double indemnity in case of accidental death, but excluded from the double indemnity coverage death resulting from "war or any act incident thereto."⁶ The insured paid an

53. See account of a recent conference on the prevention of strikes in public utility industries, N. Y. Times, Dec. 10, 1946, p. 22, col. 3.

*New York Life Ins. Co. v. Bennion, 158 F. (2d) 260 (C. C. A. 10th, 1946).

1. Janson v. Driefontein Consolidated Mines, Ltd., [1902] A. C. 484; Note, L. R. A. 1917C 662; see TROTTER, LAW OF CONTRACT DURING AND AFTER WAR (1940) 56 *et seq.*; Diamond, *Effect of War on Pre-Existing Contracts Involving Enemy Nationals* (1944) 53 YALE L. J. 700; Hand, *The Trading With the Enemy Act* (1919) 19 COL. L. REV. 112.

2. United States v. Pelley, 15 T. L. R. 166 (Q. B. 1899).

3. De La Rama S. S. Co. v. Ellis, 149 F. (2d) 61 (C. C. A. 9th, 1945); Davison Chemical Co. v. Baugh Chemical Co., 133 Md. 203, 104 Atl. 404 (1918); Tee Ka Chay v. De La Rama S. S. Co., 55 N. Y. S. (2d) 241 (1942); *cf.* Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co. [1916] 2 A. C. 397; see Notes (1942) 137 A. L. R. 1199, 1239; Ann. Cas. 1918A 14, 18.

4. Savage v. Sun Life Assurance Co., 57 F. Supp. 620 (W. D. La. 1944); Pang v. Sun Life Assurance Co., 37 Hawaii 208 (1945); Rosenau v. Idaho Mut. Ben. Ass'n, 65 Idaho 408, 145 P. (2d) 227 (1944); West v. Palmetto State Life Ins. Co., 202 S. C. 422, 25 S. E. (2d) 475 (1943); Kawasaki Kisen Kaishiki Kaisha v. Bantham S. S. Co., [1939] 2 K. B. 544; *cf.* The Leontios Teryazos, 45 F. Supp. 618 (E. D. N. Y. 1942); Verano v. De Angelis Coal Co., 41 F. Supp. 954 (M. D. Pa. 1941); Bishop v. Jones & Petty, 28 Tex. 294 (1866).

5. New York Life Ins. Co. v. Bennion, 158 F. (2d) 260 (C. C. A. 10th, 1946).

6. The phrase "any act incident thereto" was not discussed by the court, nor was it relied upon by the insurer to enlarge the concept of war. The purpose of the insurer in using the clause seems to have been an attempt to include in the excepted risk death resulting

extra premium because of his occupation as a naval officer. On December 7, 1941, Captain Bennion, commanding the battleship *West Virginia*, was killed by a bomb fragment or shrapnel during the Japanese attack on Pearl Harbor. Although the attack was launched without any prior declaration of war, some hours later Japanese Imperial Headquarters announced that war began as of dawn December 7.⁷ On the following day Congress, by joint resolution, declared, "That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared. . . ." ⁸

The insurance company paid the face amount of the policy, but denied liability under the double indemnity provision, claiming that the insured died as a result of war as that word was used in the policy. In a suit for the disputed amount, the Tenth Circuit, by a divided vote, denied recovery.⁹

The court, faced with a Virginia contract lacking state interpretation, applied the doctrine that the existence of a state of war depends upon a determination by the political department of the government and found such a determination in the actions of the President, as Commander-in-Chief and Chief Executive, in repelling the attack and requesting that Congress declare a state of war to exist from the time of the Japanese onslaught.¹⁰ An inference that the decision would not have been different had there been no action by the executive may be drawn from the court's emphasis that the attack on Pearl Harbor was war in the "grim sense of reality."¹¹ As authority for the proposition that courts may take cognizance of the existence of war from an appraisal of the actualities, the opinion cited two earlier cases which had denied recovery for deaths in the sinking of the *Lusitania* and *Reuben James*.¹² Acknowledging that ambiguous terms in insurance policies should be construed to favor the insured, the court nevertheless reasoned that the parties did not use the word "war" in the technical sense of a state of war formally declared by Congress, but contracted in contemplation of any "shooting war" which would increase the hazard to human life.¹³ Thus the decision determines that the attack on Pearl Harbor was war both in

from other than combat operations. In this respect it has been given judicial interpretation in two cases. Compare *Eggena v. New York Life Ins. Co.*, 236 Iowa 262, 18 N. W. (2d) 530 (1945), with *Hooker v. New York Life Ins. Co.*, 66 F. Supp. 313 (N. D. Ill. 1946).

7. 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES. JAPAN: 1931-1941 (U. S. Dep't State Publ. No. 2016, 1943) 786 n. 72.

8. 55 STAT. 795 (1941), 50 U. S. C. APP. IV (Supp. 1946).

9. The district court, in an unreported opinion, had held for the beneficiary.

10. 158 F. (2d) 260, 264 (C. C. A. 10th, 1946).

11. *Ibid.*

12. *Vanderbilt v. Travelers' Ins. Co.*, 112 Misc. 248, 184 N. Y. Supp. 54 (Sup. Ct. 1920) (the *Lusitania*, an English ship, was sunk by a German submarine prior to the United States' entry into World War I); *Stankus v. New York Life Ins. Co.*, 312 Mass. 366, 44 N. E. (2d) 687 (1942) (The *Reuben James*, an American destroyer, was sunk on convoy duty by an Axis submarine in October, 1941). In the first of these cases the insurer's primary, instead of double, liability was in issue.

13. 158 F. (2d) 260, 265 (C. C. A. 10th, 1946).

the legal sense and in actuality and that it was war as that term was used in the insurance policy.

Although this is the fifth case arising out of the Pearl Harbor attack, it is the first to exempt the insurer from liability on substantially the same exclusionary clause. The rationale of the other four was that the United States could not be involved in a foreign war until Congress, the constitutional war-making authority, had recognized the existence of a state of war.¹⁴ To show that armed attack does not necessarily result in war, the most closely reasoned of the four opinions, *Pang v. Sun Life Assurance Co.*, cited the Japanese bombing of the U.S.S. Panay in China four years before Pearl Harbor.¹⁵ The *Pang* opinion also emphasized that Congress did not make its declaration of war retroactive as had been requested by the President.¹⁶ Holding that the word war was ambiguous, the court then followed the general rule that language used in insurance policies to limit the liability of the company is to be construed strongly against the company.¹⁷

What the contracting parties understood by "war" is of course the basic issue in these cases. The difficulty is that the policies contain no explicit expression of intent. In its absence, the courts have embarked on conceptual discussions of the "legal" meaning of the word. Just how the conclusions on this point have fitted into the courts' reasoning, however, is not entirely clear. If combined with the tacit presumption that the parties contracted with the legal word content in mind, determination of the legal inception date will itself decide the entire case. On the other hand, where the legal connotation of the word differs from the lay or factual meaning, it will also be relevant to show an ambiguity calling for construction in favor of the insured. In any event, the role of the "legal" meaning of war as only one proposition of a syllogism should be kept in mind in the ensuing discussion.

Writers on international law agree that a declaration of war has been the exception rather than the rule and is not necessary to the existence of war.¹⁸ There is a sharp disagreement, however, as to what acts short of a declaration constitute war.¹⁹ Some authorities, pointing to the many hostile acts

14. *Savage v. Sun Life Assurance Co.*, 57 F. Supp. 620 (W. D. La. 1944); *Pang v. Sun Life Assurance Co.*, 37 Hawaii 208 (1945); *Rosenau v. Idaho Mut. Ben. Ass'n*, 65 Idaho 408, 145 P. (2d) 227 (1944); *West v. Palmetto State Life Ins. Co.*, 202 S. C. 422, 25 S. E. (2d) 475 (1943).

15. *Pang v. Sun Life Assurance Co.*, 37 Hawaii 208, 216 (1945). The dissenting judge in the *Bennion* case cited the pursuit of Villa, the attack on Vera Cruz, and the Russo-Jap border clashes in Manchuria as additional instances of deliberate aggressive acts that did not lead to war. 158 F. (2d) 260, 267 (C. C. A. 10th, 1946).

16. *Id.* at 217-8.

17. *Id.* at 221-2.

18. See MAURICE, *HOSTILITIES WITHOUT DECLARATION OF WAR* (1883) 4; Eagleton, *The Attempt to Define War* (June, 1933) INTERNATIONAL CONCILIATION No. 291, 9, 37.

19. After reviewing the attempts by writers to define war, one author states, "The variety which appears in these definitions is obvious, and reveals the surprising confusion which exists." Eagleton, *supra* note 18, at 33.

that have not resulted in war,²⁰ contend that war can exist only when aggression is coupled with intent to create a state of war.²¹ Others deplore the intention theory and deny that hostile action can be anything but war.²² Under either theory, it would seem that the United States and Japan were at war as of December 7.

The decisions of Anglo-American courts, however, seem implicitly to turn on whether the country of the forum is involved in the fighting.²³ Although judges have determined upon the facts the existence of war between two foreign nations,²⁴ they have with few exceptions held that the existence of a state of war involving their own country is a political question which must be decided by the branch of government empowered to make war.²⁵ Thus English courts look to the executive, American courts to Congress. Therefore the *Lusitania*²⁶ and *Reuben James*²⁷ cases, relied upon by the court in the instant case, are distinguishable on the single issue, among others,²⁸ that they involved wars between foreign nations.

Congressional determination need not be by a formal declaration of war, however, to command the notice of American courts.²⁹ Acts of Congress

20. A flagrant example of such a hostile act was the Italian naval bombardment and occupation of Greek territory, known as the Corfu Incident. See Wright, *Opinion of Commission of Jurists on Janina-Corfu Affair* (1924) 18 AM. J. INT. L. 536.

21. See McNAIR, *LEGAL EFFECTS OF WAR* (1944) 1; 7 MOORE, *DIG. INT. LAW* (1906) 153; Wright, *When Does War Exist?* (1932) 26 AM. J. INT. L. 362.

22. See Baty, *Abuse of Terms: "Recognition": "War"* (1936) 30 AM. J. INT. L. 377; Borchard, *"War" and "Peace"* (1933) 27 AM. J. INT. L. 114.

23. The chief reason for this distinction is that the courts do not wish to embarrass the other branches of the government in carrying on relations with other nations. Where the conflict is between two foreign nations, that possibility is remote unless the political department has indicated its interpretation of the status. See the opinion of Sir Willfred Greene, M.R., discussing the arguments of Sir Stafford Cripps, counsel in *Kawasaki Kisen Kabushiki Kaisha v. Bantam S. S. Co.*, [1939] 2 K. B. 544, 552. See also McNAIR, *LEGAL EFFECTS OF WAR* (1944) 6.

24. *Kawasaki Kisen Kabushiki Kaisha v. Bantam S. S. Co.*, [1939] 2 K. B. 544; *United States v. Pelley*, 15 T. L. R. 166 (Q. B. 1899); *cf. Thelluson v. Cosling*, 4 Esp. 266, 170 Eng. Rep. 714 (N. P. 1803). Where the political department of the government has declared the status to be war or insurrection, the courts are bound by that determination. *The Three Friends*, 166 U. S. 1, 63-4 (1897); see McNAIR, *LEGAL EFFECTS OF WAR* (1944) 6.

25. *Talbot v. Seeman*, 1 Cranch 1, 28 (U. S. 1801); *The Prize Cases*, 2 Black 635, 668 (U. S. 1862); *The Protector*, 12 Wall. 700, 702 (U. S. 1871); *United States v. 129 Packages*, 27 Fed. Cas. 284, No. 15,941 (E. D. Mo. 1862); *Sutton v. Tiller*, 46 Tenn. 593 (1869); *The Hoop*, 1 C. Rob. 196, 199, 165 Eng. Rep. 146, 147 (Adm. 1799); *The Pelican*, Edw. Adm. iv-v (app.), 165 Eng. Rep. 1160, 1161 (C. A. 1809); *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484, 497-8. *Contra: Dole v. Merchants' Mutual Marine Ins. Co.*, 51 Me. 465 (1863).

26. *Vanderbilt v. Travelers' Ins. Co.*, 112 Misc. 248, 184 N. Y. Supp. 54 (Sup. Ct. 1920).

27. *Stankus v. New York Life Ins. Co.*, 312 Mass. 366, 44 N. E. (2d) 687 (1942).

28. In both cases war had been formally declared by both England and Germany and had been recognized as war by presidential proclamation. 38 STAT. 2002 (1914); 54 STAT. 2671 (1939), 50 U. S. C. APP. note preceding § 1 (1940).

29. Nor do English courts require that executive determination of a state of war be by

other than a war declaration have been seized upon as constituting congressional recognition of the existence of war,—*e.g.*, the provision for wartime pay of troops sent to suppress the Boxer Rebellion³⁰ and the authorization of reprisals against French ships at the beginning of the nineteenth century.³¹ War has also been held to exist prior to the declaration where the declaration was retroactive in terms.³²

Exceptions to the usual reliance on congressional determination are rare. Indian depredations,³³ civil conflict,³⁴ and invasion by troops of a *de facto* revolutionary government of a neighboring country³⁵ have all been classified as war without any legislative expression. In the first two situations importance was attached to the fact that war is never declared either in rebellions or against uncivilized tribes not recognized by the community of nations; in the last case, the court's decision avoided the commission of an apparent injustice.³⁶

In the present case there seems to be no act of Congress that may be characterized as a formal recognition, for all purposes, of a state of war with Japan prior to the declaration, which was not made retroactive.³⁷ Although several laws enacted after the declaration specifically included December 7, 1941, in the war period, they were designed to provide individual benefits.³⁸

formal declaration. *Potts v. Bell*, 8 T. R. 548, 101 Eng. Rep. 1540 (K. B. 1800); *Hagedorn v. Bell*, 1 M. & S. 450, 105 Eng. Rep. 168 (K. B. 1813); *cf.* *The Eliza Ann*, 1 Dods. 244, 165 Eng. Rep. 1298 (Adm. 1813).

30. *Hamilton v. McLaughry*, 136 Fed. 445 (C. C. D. Kan. 1905).

31. *Bas v. Tingy*, 4 Dall. 37 (U. S. 1800); *Talbot v. Seeman*, 1 Cranch 1 (U. S. 1801). *But cf.* *The Spoliation Cases*, 21 Ct. Cl. 340 (1886); 22 Ct. Cl. 1 (1886); 22 Ct. Cl. 408 (1887); 44 Ct. Cl. 242 (1909).

32. *The Pedro*, 175 U. S. 354 (1899); *The Buena Ventura*, 175 U. S. 384 (1899); *The Rita*, 87 Fed. 925 (D. S. C. 1898).

33. *Montoya v. United States*, 180 U. S. 261 (1901); *Marks v. United States*, 161 U. S. 297 (1896).

34. *The Prize Cases*, 2 Black 635 (U. S. 1862); *La Rue v. Kansas Mut. Life Ins. Co.*, 68 Kan. 539, 75 Pac. 494 (1904).

35. *Arce v. State*, 83 Tex. Cr. Rep. 292, 202 S. W. 951 (1918); *cf.* *People v. McLeod*, 1 Hill 377 (N. Y. 1841).

36. The court reversed a murder conviction of Mexican soldiers who had killed a United States army corporal in a skirmish between American troops and forces of the Carranza *de facto* government.

37. The Congressional Record yields no clues as to the reason why Congress failed to accede to the President's request for a retroactive declaration. 87 CONG. REC. 9505-6, 9520-37 (1941). Compare the declaration of war against Japan, 55 STAT. 795 (1941), 50 U. S. C. APP. IV (Supp. 1946), with the declaration of war against Spain, 30 STAT. 364 (1898), which was made retroactive in terms. The Declaration against Japan was similar to that against Germany in 1917. 40 STAT. 1 (1917). The first war against Germany has been said to have begun as of the hour of the signing of the declaration by President Wilson. *Hudson, The Duration of the War Between the United States and Germany* (1926) 39 HARV. L. REV. 1020. See *Pang v. Sun Life Assur. Co.*, 37 Hawaii 208 (1945) (court discusses the Hudson article with approval, remarking that there would have been more reason to say that the war with Germany began prior to April 6, 1917, than that the war with Japan began prior to the declaration by Congress).

38. 56 STAT. 1012 (1942), 36 U. S. C. §§ 43, 45 (Supp. 1946) (eligibility for membership

Congress may, of course, designate different dates for the beginning and ending of war for particular purposes.³⁹ To interpret these special laws as expressions of a general congressional intent is to mock the ease with which such intent could have been translated into formal legislative action.

Moreover, the court's finding of a political determination of the existence of war in the acts of the President⁴⁰ seems questionable. The action of the armed forces in repelling the attack was hardly equivalent to a formal, constitutional declaration of war. To show that war may be thrust upon this country through invasion by a hostile power the court relied strongly on a dictum in the *Prize Cases*.⁴¹ But the *Prize Cases* seem clearly distinguishable. In the first place Congress had ratified the President's actions.⁴² Secondly, they involved a civil rebellion, which is seldom dignified by a formal war declaration; and the cases were decided in the middle of such civil conflict by a court under extraordinary pressure to justify the right of the President to order counter measures.⁴³ That not merely the exercise of the right but its secondary legal effects were also upheld is therefore not surprising. Moreover, functional differences are apparent; it is more than a quibble to point out that a decision on the issue of title to ships seized by blockade does not necessarily control the municipal law question of life insurance liability. Nor, in this case, should too much be read into the presidential request for a declaration of war, for there would seem to be little question that a refusal by Congress to comply with the request would have resulted in this nation's remaining at peace. Remote though the possibility may have been,⁴⁴ its mere existence demonstrates that until there is a declaration by Congress this nation is not formally at war, at least where the issue arises between its citizens. To hold otherwise is to constitute the President and the armed forces the arbiters of the status of war and peace.⁴⁵

in the American Legion); 56 STAT. 1033 (1942), 42 U. S. C. § 1711 (Supp. 1946) (benefits for employees of contractors working on United States' projects); 57 STAT. 21 (1943), 38 U. S. C. c. 12, n., Vet. Reg. No. 10, Part IV (Supp. 1946) (hospitalization, domiciliary care, and burial benefits); 57 STAT. 43 (1943), 38 U. S. C. § 701 (f), c. 12, n., Vet. Reg. No. 1(a), Part VII (Supp. 1943) (vocational rehabilitation); 57 STAT. 81 (1943), 50 U. S. C. APP. § 753 (Supp. 1946) (insignia for merchant seamen); 57 STAT. 556 (1943), 38 U. S. C. § 730 (Supp. 1946) (service as a cadet considered as active military duty); 58 STAT. 8 (1944), 38 U. S. C. § 691 *et seq.* (Supp. 1946) (mustering-out pay); 58 STAT. 811 (1944), 34 U. S. C. § 945 (Supp. 1946) (education of children of service men killed in action).

39. See the definitions of the beginning and end of war in the Trading with the Enemy Act, 40 STAT. 411 (1917), 50 U. S. C. APP. § 2 (1940); Hudson, *supra* note 37, at 1028.

40. 158 F. (2d) 260, 264 (C. C. A. 10th, 1946).

41. 2 Black 635, 668 (U. S. 1862).

42. *Id.* at 670.

43. *Id.* at 669-70.

44. For an occasion in our history when the action was far from perfunctory, see the debate on the declaration of war against Mexico. CONG. GLOBE, 29th Cong., 1st Sess. (1846) 782 *et seq.*; Baldwin, *The Share of the President of the United States in a Declaration of War* (1918) 12 AM. J. INT. L. 1, 2.

45. It seems that the war power was put in Congress because of the fear of executive war-making. See 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION (1937) 318-9. In

The word "war" then has more than a single meaning. The court in the instant case resolved the ambiguity by declaring that the parties did not intend "to use the word war in the technical sense of a formally declared war."⁴⁶ But this is too glib an assumption. Intent cannot be found by fiat. It is equally plausible to argue that Captain Bennion believed undeclared armed conflict to be one of the occupational hazards for which an extra premium was required. So also it is reasonable to assert that the insurance company lawyers, in drawing up the contract, were aware of the legal connotations attached to the word "war." This is not to argue that such conclusion is inescapable, but rather that it is as reasonable as that reached in this case. If this be granted, it follows that the words used were ambiguous—a conclusion bolstered by the fact that four courts had already held contrary to the Tenth Circuit⁴⁷—and that the policy should have been construed in favor of the insured.⁴⁸ Insurance company draftsmanship would still not bear too onerous a burden in excepting the risk of death resulting from armed conflict lacking a formal war label; other insurers have been more explicit on this same issue.⁴⁹ Nor would it have involved the foresight of a seer; the history of our relations with other nations has not been devoid of such incidents.⁵⁰

more recent years this distrust has extended even to the power granted to the Congress, culminating in proposals for a popular referendum on the question of war. See *Hearings before Committee on the Judiciary on H. J. Res. 217, 218, 73d Cong., 2d Sess.* (1934).

46. 158 F. (2d) 260, 265 (C. C. A. 10th, 1946).

47. See note 14 *supra*. Disagreement among courts has been relied upon to demonstrate ambiguity in the meaning of a clause in an insurance policy. See *Stroehmann v. Mutual Life Ins. Co. of New York*, 300 U. S. 435, 439-40 (1937).

48. *Stroehmann v. Mutual Life Ins. Co. of New York*, 300 U. S. 435 (1937); *Aschenbrenner v. United States Fidelity & Guaranty Co.*, 292 U. S. 80 (1934); *Mutual Life Ins. Co. v. Hurni Co.*, 263 U. S. 167 (1923); *Manufacturers' Accident Indemnity Co. v. Dorgan*, 58 Fed. 945 (C. C. A. 6th, 1893); *Newsoms v. Commercial Casualty Ins. Co.*, 147 Va. 471, 137 S. E. 456 (1927);² COOLEY, BRIEFS ON INSURANCE (1927) 971, 981; VANCE, INSURANCE (1930) 689.

This is but a recognition that in any contract words bearing more than one reasonable meaning should be interpreted more stringently against the party who employed them. RESTATEMENT, CONTRACTS (1932) § 236(d), comment.

49. The ease with which the ambiguity could have been avoided has been emphasized. *Stroehmann v. Mutual Life Ins. Co. of New York*, 300 U. S. 435, 439-40 (1937). Contracts of marine insurance have employed language which would clearly cover the exception here claimed by the insurance company. See *Standard Oil Co. v. United States*, 267 U. S. 76, 77 (1925) ("... all consequences of hostilities or warlike operations, whether before or after declaration of war."); *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487, 490 (1924) ("... all consequences . . . of hostilities or warlike operations.").

50. One need only consider the Panay Incident in 1937, the landing of troops in Nicaragua, the Vera Cruz episode in Mexico, and the bombardment of Greytown in 1853. See OFFUTT, THE PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE UNITED STATES (1928); RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (U. S. Dep't State Publ. No. 538, 1934); Tansill, *War Powers of the President of the United States with Special Reference to the Beginning of Hostilities* (1930) 45 POL. SCI. Q. 1.